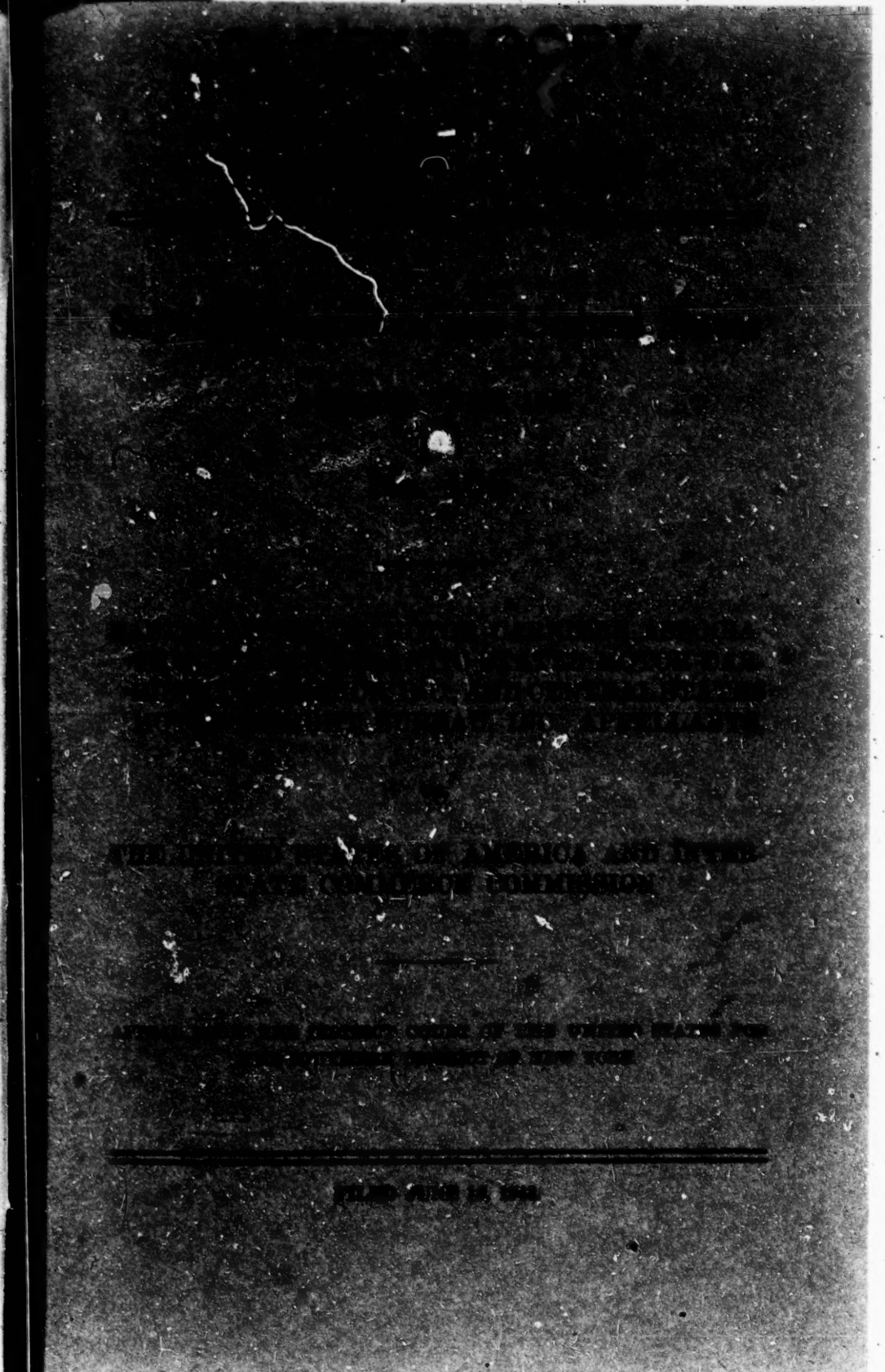

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-390

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, Plaintiff

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed October 13, 1942

The petition of Eastern Central Motor Carriers Association respectfully shows unto the Court as follows:

I

Plaintiff is a non-stock, non-profit voluntary membership corporation organized and existing under and by virtue of the laws of the State of New York. Its membership consists of numerous common carriers of property for hire by motor vehicle engaged in transportation of property in interstate and foreign commerce between places in Eastern Trunk Line Territory (including New York City in the Southern District) and New England, on the one hand, and points and places in Western Trunk Line Association and Central Freight Association territories, on the other hand. Plaintiff is by its articles of incorporation authorized by the laws of the State of New York to sue and be sued. In addition thereto it is the duly constituted agent of its membership, in their behalf, to prepare and file with the Interstate Commerce Commission tariffs and freight charges as required [fol. 3] by law covering the interstate and foreign transportation of property by its members and to appear and represent such members in any proceedings before the Interstate Commerce Commission concerning such tariffs and the rates and charges contained therein.

II

The defendant, United States of America is sued in this proceeding as a statutory defendant under and by virtue of

an Act of Congress directing and authorizing suits of this character seeking to annul, set aside and enjoin enforcement of orders of the Interstate Commerce Commission so to be instituted; and the defendant Interstate Commerce Commission is an administrative body created by an Act of Congress, February 4, 1887, and under later amendments possessing in general the power of regulating the rates, charges, and rules of common carriers of property for hire by motor vehicle in interstate and foreign commerce.

III

Bearing effective dates of August 24, 1940 and January 25, 1941 plaintiff, through its general manager, E. H. Russell, as agent, filed with the Interstate Commerce Commission tariff schedules for the corporate members containing new and reduced rates on hard surface floor covering including carpets, carpeting, door and floor mats and laying sundries and accessories, from various points in Eastern Trunk Line and New England territories (including New York City in the Southern District), to various points and communities in Central Freight Association and Western Trunk Line territories. Prior to the effective dates of such new and reduced rates the Interstate Commerce Commission, by order of Division 2 thereof, entered upon an investi- [fol. 4] gation of their lawfulness; and pending the hearing and decision therein said Division 2 ordered that the operation of such new and reduced schedules be suspended, as authorized by law. In due course a hearing thereon was held in the city of Columbus, Ohio on March 21, 1941. Thereafter on November 17, 1941, there were made and entered a report and order of the Commission by Division 3 thereof in which it was determined that the said schedules would be unlawful and respondent motor carriers, members of the plaintiff corporation and their agent, were directed on or before December 24, 1941 to cancel such schedules. Plaintiff was a party to such proceedings before Divisions 2 and 3. On December 13, 1941, plaintiff and the motor carrier respondents petitioned for reconsideration and rehearing of such decision and order, which was denied. Thereupon the suspended schedules were canceled as ordered by Division 3 but plaintiff and other respondent motor carriers then renewed their endeavor to obtain reconsideration. Such reconsideration thereafter was granted by

the full Commission, and the matters and things involved were further briefed and orally argued before the full Commission on May 28, 1942. On August 11, 1942 the full Commission (ten Commissioners participating) by a vote of seven to three affirmed the action of Division 3 in ordering cancellation of the suspended schedules but made new findings and predicated the decision upon new and different findings and conclusions of law. No further order was necessary as the prior order of Division 3 remained in effect.

IV

As authorized by law this action is instituted against the United States of America and the Interstate Commerce Commission to annul and set aside such order and to enjoin [fol. 5] its enforcement. A copy of the report and order of Division 3 dated November 17, 1941, is attached hereto and made a part hereof being marked Exhibit A; and a copy of the report of the full Commission upon review, dated August 11, 1942, is attached and made a part hereof being marked Exhibit B.

V

In and by the said schedules so ordered canceled, the following condition of rates was undertaken to be brought about: With respect to so-called less than truckload shipments of the involved commodities, consisting of small weight shipments, the then existing rates would remain as formerly in effect i.e. 70% of first class; when shipments might be tendered in quantities of not less than 20,000 pounds but less than 30,000 pounds 47½% of first class; and on shipments tendered in quantities of 30,000 pounds or more 45% of first class. Such alternative rates were offered to any member of the shipping public without any restriction whatsoever other than that to be entitled to the benefits of either the 47½% or 45% of first class rates it was required that the quantities tendered must be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

VI

In and by its decision of August 11, 1942, not disturbing the November 17, 1941 order of Division 3, it was concluded by the majority of the full Commission that the slightly

lower rates of 45% of first class, to be available on shipments weighing 30,000 pounds or more, would give an unjust advantage to shippers of such quantities and be unjustly discriminatory to shippers of quantities weighing less than 30,000 pounds but more than 20,000 pounds upon which the suspended rates would 47½% of first class. [fol. 6] There was no conclusion with respect to any matter of unjust advantage or discrimination as between small lot less than truckload shipments and the larger lot shipments to be covered by rates equal to 47½% or 45% of first class.

VII

Plaintiff respectfully shows unto the Court that such conclusion of a majority of the Commission as to unjust advantage and unjust discrimination as between shippers is, as a matter of law, erroneous on its face. Both the ratings of 47½% and 45% of first class would be equally available to any shippers at their own option dependent only upon the quantities they might choose to ship at one time on one bill of lading. Any and all shippers would have the benefit of choice. There is and can be no unlawful advantage and discrimination and violation of any provision of the Interstate Commerce Act which accords to any and all shippers equal opportunities and entitles each to the benefit of a mere choice as between a lower and higher rate dependent only upon a difference in the quantity shipped at one time. There was no finding that practical availability of the rating of 45% on shipments of 30,000 pounds or more would be confined only to a limited few shippers as against a large mass of shippers whose course of business would confine them to smaller shipments weighing between 30,000 and 20,000 pounds.

VIII

No shipper appeared at the public hearing of said proceedings held in Columbus, Ohio, March 1, 1941 to interpose any objection to the involved schedules nor did any shippers submit any evidence at that hearing showing or attempting to show any shurtful discrimination or undue advantage that would result from the openly published choice of rates [fol. 7] offered by respondents. The only protestants at such hearing were certain railroads who, in the course of

the hearing, withdrew their protest and withdrew from the proceeding before it was concluded. There was no record before the Commission on which to base a conclusion of undue advantage or discrimination as between shippers because of the offer of an alternative rate and minimum weight openly published for availability to all.

IX

In and by its report of August 11, 1942 the Commission majority found that the rating of 45% of first class undertaken to be made effective by the respondent motor carriers, to be available on shipments weighing not less than 30,000 pounds, was attributable to and was caused by the competition of equivalent rates and minimum weights of railroads operating between the same origins and destinations. Plaintiff respectfully shows unto the Court that under the Interstate Commerce Act in the absence of special findings hereinafter to be referred to it is the lawful right of common carriers of property for hire by motor vehicle to adapt their rates and the limitations upon their availability to those already in effect by railroads between the same origins and destinations in order to compete fairly and not be deprived of the privilege of participating in the traffic. The majority of the Commission erred as a matter of law in holding and determining that such defense of competition is not available under the statute and is not a legal justification for a difference of rates as between different quantities shipped. There was no finding that the competitive exertion in this instance would have a destructive effect; there was no finding that the earnings of the motor carrier respondents thereunder would be so unduly low as to cast a burden upon their other traffic; there was no [fol. 8] finding that the suspended schedules containing the rating of 45% of first class on shipments of 30,000 pounds or more went beyond competitive requirements; and there was no finding that in any other respect would the National Transportation Policy be impaired by such meeting of competition by plaintiff's member motor carriers.

X

On the contrary the conclusion of the majority of the Commission was only that it would not "as a matter of policy" in this or any other case accept and apply the defense of

competition under such circumstances whenever it might so appear, as in this situation, that to accommodate loadings of 30,000 pounds or more motor carriers would, in many instances, be required to utilize some parts of the carrying space of more than one motor vehicle. Plaintiff respectfully alleges that the Interstate Commerce Commission wholly lacks the power to deprive motor carriers of the defense of competition with railroads merely "as a matter of policy" in cases of claimed undue advantage or discrimination as between shippers.

XI

Plaintiff further respectfully shows to the Court that the report and decision of the full Commission majority is capable of being construed to mean that the privilege of motor carriers to meet the competition of railroads was not denied in respect to the rating of 45% of first class, minimum weight 30,000 pounds, if such rating stood alone but that unlawfulness would attach to such rating when accompanied by the privilege of shippers to tender less than 30,000 pounds but not less than 20,000 pounds at a rating of 47½%. If such be a correct construction of the intent of the full Commission majority, error is committed thereby because the rating of 45%, minimum weight 30,000, if otherwise lawful due to the meeting of railroad competition, is not rendered unlawful because the respondent member motor [fol. 9] carriers voluntarily elect to offer to shippers a slighter higher but reasonable rate to be available on shipments weighing less than 30,000 pounds but not less than 20,000 pounds.

XII

In its determination of unjust advantage and discrimination as between shippers in respect of the two ratings of 47½% and 45% of first class, the Commission majority declared the rule of law to be that notwithstanding competition may compel the lower of the two ratings the offer of both would constitute unjust advantage and discrimination as between shippers unless the lower of the two ratings was justifiable because of lower operating expenses, which it was said was not proved on the record. Plaintiff respectfully alleges that the majority of the Commission thereby committed error of law for the reason that the defense of

competition as against a contention of advantage and discrimination is not qualified in law by the need to predicate a difference of rate upon a difference of cost of operations.

XIII

In its report and decision the Commission majority found that both the 47½% and 45% of first class ratings would be just and reasonable in amounts if dissociated from the difference in minimum weights undertaken to be applied in connection therewith. It was determined, however, that the lower of the two ratings would be unjust and unreasonable because in many instances as much as 30,000 pounds of the involved commodities could not legally be loaded in a single motor vehicle and an overflow of part of the shipment into a second vehicle would be required. It was said that "it is doubtful" whether there would be available other freight of other shippers to be loaded into such second vehicle containing the overflow of the involved commodities. It therefore was concluded that the rating of 45%, if [fol. 10] accompanied by the limitation of its availability to 30,000 pounds or more, would be unlawful because it would constitute "inefficient" transportation service at more than the lowest operating cost consistent with the furnishing of it. Plaintiff respectfully shows unto the Court that such determination is upon its face an error of law for the reason that the Commission does not possess power directly or indirectly to predicate a conclusion of illegality of a given rate and minimum weight upon a finding that inefficient tranportation service would be the result thereof. There was no finding that the partial use of a second vehicle in order to accommodate 30,000 pounds of a single shipment at the rating of 45% of first class would cause the total earnings to be unremunerative or cast an undue burden upon other traffic. The Commission lacks the power to determine which of two methods of operation with respect to competitive traffic would be the most efficient and upon that ground deprive respondent motor carrier members of the plaintiff organization of the privilege of meeting such competition because the resulting motor carrier operations would be less efficient than if they did not meet such competition. Furthermore there is no finding that inefficiency of operation would be involved if the second motor vehicle

be fully loaded either with the involved or other freight and there was no record before the Commission upon which to predicate the expression of "doubt" as to whether such additional freight would be available. The Commission lacks the authority to predicate a decision in such a case upon its mere speculations in the way of "doubt" not supported by facts of record and attributing to respondent motor carrier members of plaintiff an intentional purpose so to conduct their business as to be inefficient.

[fol. 11] XIV

Plaintiff avers that as a consequence of the order of the Commission its member motor carriers are deprived of the opportunity of competing with railroads on fair and equal terms with consequent loss of traffic and injury to their business for which there is no plain, complete and adequate remedy at law.

Wherefore it is respectfully prayed that process may issue requiring the defendants and each of them to answer this petition; that upon final hearing such order of the Commission be annulled and set aside and its enforcement enjoined; and that pending such final hearing and order of this Court, plaintiff may have an interlocutory injunction suspending or restraining the enforcement, operation or execution of such order; and that plaintiff may have such other and further relief as the facts shown and to be shown unto the Court may require, including the costs of this action.

(Signed) Charles E. Cotterill, Attorney for plaintiff. P. O. Address: 70 East 45th Street, New York, N. Y.

[fol. 12] EXHIBIT "A" TO PETITION

M-5770

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. M-1216[1]

Rugs and Matting from the East to Western Trunk Line Territory

Submitted April 10, 1941. Decided November 17, 1941

Proposed suspended reduced classification-exceptions rating on hard-surface floor covering, including carpets, carpeting, door and floor mats, laying sundries, and accessories, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and proposed new commodity rates from certain points in New England and trunk-line territories to certain points in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, subject to minima of 20,000 pounds and 30,000 pounds, and proposed new and reduced commodity rates, minimum 30,000 pounds, from points in New England and trunk-line territories to certain points in Ohio, found just and reasonable and otherwise lawful, except to the extent that the minimum of 30,000 pounds exceeds a minimum of 20,000 pounds. Suspended schedules, to the extent found not just and reasonable, ordered canceled without prejudice to the publication by respondents of rates on linoleum, minimum 20,000 pounds, which are not less than 45 percent of the corresponding first-class rates. Proceedings discontinued.

J. E. Haydon, L. M. O'Leary, and Joseph H. Edwin for respondents.

James A. Gillen, Henry Christianson, W. M. Spaulding, and H. D. Boynton for protestants.

P. G. Whitmore for others.

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[1] This report also embraces Investigation and Suspension Docket No. M-1445, Linoleum and Related Articles from the East to Ohio.

Report of the Commission

Division 3, Commissioners Mahaffie, Miller, and Johnson

By Division 3:

In Investigation and Suspension Docket No. M-1216, by schedules filed to become effective August 24, 1940, the respondent motor common carriers[2] proposed to establish on hard-surface floor covering, including carpets, carpeting, door and floor mats, and laying sundries and accessories, hereinafter called linoleum, a reduced classification-exceptions rating, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and new commodity rates, subject to minima of 20,000 pounds and 30,000 pounds, from 14 points of origin in trunk-line and New England territories[3] to 34 points in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. Upon protests of the western trunk-line rail carriers, operation of the proposed schedules was suspended until February 20, 1941, and subsequently the respondents postponed indefinitely the operation of the schedules. At the hearing, owing to a tariff provision which the respondents agreed to make applicable in connection with the proposed schedules, the rail carriers presented no evidence.

[fol. 13]

In Investigation and Suspension Docket No. M-1445, the respondent motor common carriers, by schedules filed to become effective January 25, 1941, proposed to establish on linoleum new and reduced commodity rates, minimum 30,000 pounds, from the points of origin named in footnote 3, Marcus Hook, Pa., and points taking the same rates, to Akron, Canton, Cleveland, Columbus, and Toledo, Ohio, and

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[2] Parties to the tariffs filed by Eastern-Central Motor Carriers Association, Agent Everett H. Russell.

31 M. C. C.

[3] Group A, Trenton, N. J.; group B, Salem, N. J.; group C, Wilmington, Del., Camden and Paulsboro, N. J., and Eddystone and Philadelphia, Pa.; group D, Lancaster, Pa.; group E, Kearny and Somerville, N. J., and New York, N. Y.; and group F, Boston, East Walpole, and West Walpole, Mass.

31 M. C. C.

points taking the same rates. Upon protest of the New England Freight Association, the operation of the proposed schedules was suspended until August 25, 1941, and subsequently the respondents indefinitely postponed the operation of the schedules. The Roadway Express, Inc., and the Shippers' Freight Forwarding Company appeared in support of the proposed rates. Subsequent to the hearing, the rail carriers withdrew their protest.

The proceedings were heard separately but are consolidated here for our convenience. They pertain to the lawfulness of proposed truckload and volume rates on linoleum published on behalf of motor common carriers, members of the Eastern-Central Motor Carriers Association, hereinafter called the association. Rates are stated in amounts per 100 pounds.

I. and S. No. M-1216.—At the time the rates in this proceeding were suspended, the respondents maintained column 50 rates (50 percent of first class), minimum 20,000 pounds, on linoleum from the points of origin in New England and trunk-line territories shown in footnote 3 to the 34 destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. During the pendency of the proceedings, the rates on linoleum to Minnesota and South Dakota points were increased to the column 55 rates (55 percent of first class), minimum 20,000 pounds, and the classification rating was reduced to 45 percent of first class. The latter basis is not used because respondents' rate tariffs contain a rule under which articles rated lower than column 50 are subject to column 50 rates, except that articles subject to an exception rating of column 50K take column 50K rates. The [fol. 14] Keeshin Motor Express Company, hereinafter called Keeshin, maintains commodity rates on linoleum, minimum 18,000 pounds, from certain points in New England and trunk-line territories to points in western trunk-line territory which are somewhat lower than the proposed rates, minimum 20,000 pounds, and somewhat higher than the proposed rates, minimum 30,000 pounds. On August 24, 1940, the effective date of the proposed schedules, the rail carriers maintained rates from these points of origin to points in western trunk-line territory equal to 45 percent of first class, minimum 30,000 pounds. Subsequently the rail carriers established commodity rates which approximate 42.5 percent of first class, minimum 30,000 pounds, from and to many of these points.

The respondents propose to establish on linoleum classification-exceptions ratings of column 50K, 47.5 percent of first class, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska. They also propose to establish new commodity rates, minimum 20,000 pounds, from the grouped points of origin named in footnote 3 to certain points in Iowa, Kansas, Missouri, and Nebraska, which approximate column 50K, and to certain points in Minnesota and South Dakota, which approximate column 50, and rates, minimum 30,000 pounds, to the destinations in the States named which are 45 percent of first class. The proposed rates, minimum 20,000 pounds, range from 91 cents from Lancaster, Pa., to Cedar Rapids, Iowa, to $1.67 from Boston to Dodge City, Kans., 1,819 miles. The highway distance from Lancaster to Cedar Rapids is not shown, but the distance from Philadelphia to Cedar Rapids is 988 miles, and the proposed rate is 93 cents. The proposed rates, minimum 30,000 pounds, range from 86 cents from Lancaster to Cedar Rapids to $1.57 from Boston to Dodge City. The rate from Philadelphia to Cedar Rapids is 88 cents.

The record shows the highway distances, the proposed rates, and the revenue that would be derived from the proposed rates from Boston, New York, and Philadelphia to the 34 points of destination in the States named. The proposed rates, minimum 20,000 pounds, from these points to the points of destination would yield, based upon a loading of 22,000 pounds, revenue ranging from 18 cents a truck-mile under the rate of $1.12 from Boston to Chillicothe, Mo., 1,369 miles, to 24.9 cents a truck-mile under the rate of $1.27 from Philadelphia to Springfield, Mo., 1,121 miles. The proposed rates, minimum 30,000 pounds, would produce, based upon a loading of 22,000 pounds, revenue ranging from 16.9 to 23.4 cents a truck-mile under the respective rates of $1.05 and $1.19 from and to the respective points.

I. and S. No. M-1445.—The respondents maintain from the points of origin shown in footnote 3, Marcus Hook, and points taking the same rate to Akron, Canton, Cleveland, [fol. 15] Columbus, Toledo, and points taking the same rates, on linoleum, rates, minimum 20,000 pounds, based on classification-exceptions ratings of column 50K (approximately 47.5 percent of first class), except that specific commodity rates, minimum 20,000 pounds, are in effect of 56 cents from Kearny, Port Newark, and Trenton, N. J.,

Marcus Hook, and Philadelphia to Akron and Cleveland; of 50 cents from Wilmington, Del., to Akron and Cleveland; and of 60 cents from Wilmington to Toledo. The Eastern Motor Dispatch, Inc., maintains, on linoleum, rates, minimum 30,000 pounds, from and to many of the points to which the respondents have in effect column 50K, rates equal to column 45 (approximately 45 percent of first class). That carrier and the Liberty Motor Freight Lines, Inc., maintain rates, minimum 16,000 pounds, of 56 cents to Akron and Cleveland, 54 cents to Canton, and 59 cents to Columbus and Toledo, from Chester, Pa., Kearny, Marcus Hook, New York, Philadelphia, Somerville, Trenton, and Yonkers, N. Y., and rates, minimum 20,000 pounds, of 53 cents to Akron, Canton, and Cleveland, 56 cents to Columbus, and 59 cents to Toledo from Lancaster. Many of these commodity rates are less than and others are greater than the column 45 rates. Keeshin also has in effect commodity rates, minimum 16,000 pounds, from Kearny, Port Newark, and Yonkers, of 56 cents to Akron and Cleveland, and of 59 cents to Toledo, and a rate of 68 cents from Walpole to Cleveland. The rail rates, minimum 30,000 pounds, from New England and truck-line territories to the Ohio points are 45 percent of first class.

The respondents propose to establish from and to these points, except that no rates are proposed from Kearny to Akron and Cleveland, specific commodity rates, minimum 30,000 pounds, which are the same as the rail rates, and are based upon 45 percent of first class. The proposed rates range from 49 cents from Lancaster to Canton to 68 cents from Boston, East Walpole, and West Walpole to Columbus. The record shows only the highway distances from nine points of origin to the respective destinations. These nine distances vary from 333 miles from Lancaster to Canton to 772 miles from Boston to Columbus. Based upon a loading of 22,000 pounds, the customary truckload, the proposed rates would yield revenues ranging from 32.4 cents to 19.4 cents a truck-mile. Computations also were made showing the revenue that would be obtained from the proposed rates on the basis of loadings of 23,000 pounds and 24,000 pounds.

The proposed rates to Ohio points are subject to a rule which provides that they would apply only on shipments of linoleum, minimum 30,000 pounds, which are received at

and transported from the point of origin, from one shipper, in one day, and on one bill of lading. The proposed rates to the 34 destinations in Iowa, Kansas, Minnesota, Missouri, [fol. 16] Nebraska, and South Dakota are not subject to such a rule, but the respondents and the rail carriers agreed that a similar provision should be made applicable in connection with them.

As stated, specific-commodity rates, minimum 20,000 pounds, and minimum 30,000 pounds, are proposed to certain points in western trunk-line territory. The rates would apply in the alternative. Thus a shipper having a shipment weighing 20,000 pounds or more would be accorded a truckload rate.

The respondents do not propose to establish commodity rates, minimum 20,000 pounds, to the Ohio points. They maintain commodity rates, minimum 20,000 pounds, from Port Newark, Trenton, Marcus Hook, and Philadelphia to Akron and Cleveland, and from Wilmington to Akron, Cleveland, and Toledo. Of these only the rates from Trenton, Marcus Hook, and Philadelphia are higher than the proposed rates, minimum 30,000 pounds. If the latter became effective they would apply in the alternative with the commodity rates, minimum 20,000 pounds, from the three points named. The proposed rate from Port Newark (this point takes the New York rate) to Akron and Cleveland is 58 cents, minimum 30,000 pounds, and, as stated, the present commodity rates, minimum 20,000 pounds, from Port Newark to these points are 56 cents. The proposed rates, minimum 30,000 pounds, from Wilmington to Akron and Cleveland, are 53 cents, and that from Wilmington to Toledo is 61 cents, but, as stated, the present commodity rates, minimum 20,000 pounds, from and to these points, are 50 and 60 cents respectively. Therefore, if the proposed rates were approved they would not be the applicable rates from and to these points, for the reason that the lower commodity rates, minimum 20,000 pounds, would apply on truckload shipments of linoleum.

Respondent Brady Transfer & Storage Company, of Fort Dodge, Iowa, hereinafter called Brady Transfer, transports linoleum from points in New England to points in western truck-line territory and Ohio. It operates equipment, some of which has a loading capacity of from 22,000 pounds to 25,000 pounds of linoleum. During 1940 its total cost of operation, including terminal expense and the expense of

pick-up and delivery service, on all traffic, both truckload and less than truckload, transported by it, approximated 17.55 cents a truck-mile. Linoleum when shipped in truckloads is handled from point of origin to point of destination direct and does not require so-called terminal service. The average terminal expense on all traffic of the Brady Transfer for 1940 was estimated to approximate 3.07 cents a truck-mile. Only a minor portion of this expense, such as the cost of billing and of the dispatcher, who receives the order for the shipment, would be allocable to the transportation of [fol. 17] linoleum in truckloads. Based upon these costs, the proposed rates are contended to be reasonably compensatory.

This respondent compared the proposed rates, minimum 20,000 pounds and minimum 30,000 pounds, from Boston, New York, and Philadelphia to points in western trunk-line territory with the rates on dairy products, minimum 20,000 pounds, in the reverse direction. In 1940, dairy products comprised approximately 92 percent of the traffic transported by Brady Transfer from points in western trunk-line territory to the Atlantic seaboard. In only four instances do the rate on dairy products exceed the proposed rates, minimum 20,000 pounds, and in numerous instances they are the same as or lower than the proposed rates, minimum 30,000 pounds, and the remainder of the compared rates fall between the higher and lower bases of rates proposed. Dairy products move under refrigeration, and are more costly to transport than linoleum. The respondents maintain from Boston to certain points in western trunk-line territory, some of which are points of destination herein, rates on fresh frozen fish, minimum 20,000 pounds, including refrigeration, based upon classification exceptions ratings of 50 percent of first class, and lower commodity rates, minimum 22,000 pounds, not including the cost of ice. Brady Transfer transported approximately 1,000 truckloads of fish during 1940 from Boston to points in western trunk-line territory.

Respondent Yankee Lines, Inc., hereinafter called Yankee Lines, of Akron, hauls linoleum from certain origins in trunk-line territory to points in Ohio. It has equipment capable of transporting loads ranging from 9,600 to 25,500 pounds, but the greater portion of its equipment has a payload capacity in excess of 20,000 pounds. This carrier's experience has indicated that the cost of operation of units

of equipment capable of transporting pay loads of from 9,600 pounds to 16,000 pounds varies from 9 cents to 17 cents a truck-mile, and that the cost of operating equipment capable of hauling pay loads of from 20,000 to 25,500 pounds varies from 20.3 to 24.7 cents a truck-mile. The record does not contain the data from which these costs were determined. It does, however, show that the average cost of operation incurred by the Yankee Lines on all traffic, both truckload and less-than-truckload, during 1940 was 21.1 cents a truck-mile.

Yankee Lines compared the proposed rates with motor common carrier rates on numerous commodities. The only rates referred to having minima in excess of 23,000 pounds are rates of 51 cents, minimum 30,000 pounds, on drugs and medicines, and of 61 cents, minimum 40,000 pounds, on liquor, from Hartford, Conn., to Cleveland, a highway distance of 571 miles. This respondent maintains rates on liquor, minimum 45,000 pounds, based upon 44 percent of [fol. 18] first class. It is contended by this respondent that these comparisons demonstrate that the proposed rates would be just and reasonable.

The record establishes that rates based upon 45 percent of first class from points of origin in New England and trunk-line territories to points in western trunk-line territory and Ohio are just and reasonable provided the minimum that is applicable in connection therewith is reasonable. Let us, therefore, examine the reasons advanced by the respondents in support of the proposed minimum of 30,000 pounds.

Yankee Lines originally requested the standing rate committee of the association to publish rates on linoleum from the points in trunk-line territory served by it to the five points in Ohio on a basis of 45 percent of first class, minimum 22,000 pounds, in order to enable it to meet the competition of the railroads and of the Eastern Motor Dispatch, Inc. Since other members of the association were interested in similar rates, and since apparently the desire was to publish rates identical with those of the rail carriers, the standing rate committee of the association obtained permission from the Yankee Lines to increase its proposed minimum from 22,000 pounds to 30,000 pounds, and filed on behalf of the Yankee Lines and the other respondents the proposed rates, minimum 30,000 pounds, to the Ohio destinations. The linoleum shipments which move by rail

to the Ohio points generally are consigned to warehouses having rail sidings. Linoleum is tendered for shipment to the respondents in quantities weighing from 18,000 pounds upward. The Yankee Lines received on one bill of lading one shipment which weighed 134,000 pounds. The record does not show the weight of the average shipment. It shows clearly, however, that it is physically impossible to load 30,000 pounds of linoleum into a single unit of equipment operated by the respondents. While some equipment is capable of transporting 25,000 pounds, the normal truckload of linoleum approximates 22,000 pounds, and, as seen above, the respondents used this loading in each proceeding to obtain the revenue which would be derived from the proposed rates. It also will be noted that the respondents and competing motor common carriers maintain commodity rates on linoleum subject to minimum weights of 16,000 pounds, 18,000 pounds, and 20,000 pounds.

In justification of the proposed minimum of 30,000 pounds, the respondents rely upon *Carpets and Carpeting, Official to Southern Territory*, 237 I. C. C. 651. In that proceeding the Commission had under consideration, among other things, the lawfulness of proposed motor common carrier rates on linoleum from official to southern territory. Certain motor common carriers proposed therein to retain the [fol. 19] column 50 rating, minimum 15,000 pounds, and to establish certain rates, subject to a minimum of 30,000 pounds, the latter rates, which are the same as or generally 1 cent higher than the column 45 rail or rail-water rates, to alternate with the then present column 50 basis. With respect to these proposals the Commission at pages 657-658 said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

And the Commission at page 658 found—

that the postponed schedules of the motor-carrier respondents have not been shown to be unreasonable or otherwise unlawful except to the extent (*a*) that they propose to retain a minimum of less than 20,000 pounds, (*b*) that they provide rates subject to a minimum of 30,000 pounds which are lower than the corresponding proposed carload rates for application jointly by railroad and water carriers hereinabove found not shown to be unreasonable or otherwise unlawful, and (*c*) that a rule is not provided in connection with the column 45 basis to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

In *Peanut Butter from Montgomery, Ala., to Georgia*, 22 M. C. C. 375, division 2, in discussing the question of minimum weights, at pages 377-378 said:

Motor carriers should not maintain truckload or volume rates subject to minimum weights greater than they are able to transport in the equipment which they generally have available. There are numerous motor-carrier rates subject to volume minimum weights which exceed the amount which can be transported in the trucks generally used for the transportation of the commodities on which these rates apply. The national motor-freight classification is replete with ratings subject to minimum weights of 40,000, 50,000, and 60,000 pounds. In most States, restrictive laws prevent the transportation by motor carriers of loads as heavy as 20 to 30 tons in single units of equipment. We have not condemned the minimum weights of motor carriers which can only be transported in more than one vehicle. Yet we believe that all rates subject to a minimum weight should be restricted to apply only when the shipments which equal or exceed the minimum weight are actually tendered to the carrier for transportation from one shipper and are transported from the point of origin in 1 day and on one bill of lading, subject, of course, to any tariff provisions allowing split pick-ups or partial loading in transit. This view is in consonance with *Carpets and Carpeting from Official to Southern Territory*, 237 I. C. C. 651.

[fol. 20] The Commission has found repeatedly that carload minimum weights should be established by rail carriers

with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

Findings.—We find that the proposed schedules in these proceedings are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable.

The proposed schedules, to the extent found not just and reasonable, will be ordered canceled without prejudice to the establishment by respondents of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 percent of the corresponding first-class rates.

An appropriate order will be entered.

[fol. 21] ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office in Washington, D. C., on the 17th Day of November, A. D. 1941

Investigation and Suspension Docket No. M-1216

Rugs and Matting, East to Western Trunk Line Territory

Investigation and Suspension Docket No. M-1445

Linoleum and Related Articles, East to Ohio

It appearing, That by orders dated August 23, 1940, in Investigation and Suspension Docket No. M-1216 and January 24, 1941, in Investigation and Suspension Docket No. M-1445, the Commission entered upon hearings concerning the lawfulness of rates, charges, regulations, and practices stated in the schedules described in said orders, and suspended the operation of said schedules until February 20, 1941 and August 25, 1941, respectively, and subsequently the respondents voluntarily postponed the operation of the said schedules indefinitely;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made and that said division on the date hereof has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents in Investigation and Suspension Dockets Nos. M-1216 and M-1445 be, and they are hereby, notified and required to cancel the said schedules to the extent found unjust and unreasonable, on or before December 24, 1941, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, and that said proceedings be discontinued.

By the Commission, division 3.

W. P. Bartel, Secretary. (Seal.)

[fol. 22] EXHIBIT "B" TO PETITION

Interstate Commerce Commission

Investigation and Suspension Docket No. M-1216

Rugs and Matting from the East to Western Trunk Line Territory

Submitted May 28, 1942. Decided August 11, 1942

1. Upon oral argument, finding in the prior report, 31 M. C. C. 193, that proposed rates, minimum 30,000 pounds, on hard-surface floor covering from certain points in New England and trunk-line territories to certain destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota were unjust and unreasonable, affirmed.

2. Further found that maintenance on the same traffic of lower rates, minimum 30,000 pounds, than rates, minimum 20,000 pounds, would be unjustly discriminatory.

Additional appearances:

Charles E. Cotterill, Edgar Watkins, Jr., J. Ninian Beall, F. C. Hefferren, W. G. Clayton, Jr., O. L. Merchant, Leo E. Golden, and *Dabney T. Waring* for respondents and motor carrier publishing agents, interveners.

John S. Burchmore, John T. Money, Charles J. Fagg, E. G. Siedle, Nuel D. Belnap, Luther M. Walter, and *W. H. Ott* for others.

Report of the Commission Upon Oral Argument

By the COMMISSION:

In this proceeding, the respondents proposed to establish on hard-surface floor covering, including carpets, carpeting, door and floor mats, laying sundries, and accessories, hereinafter called linoleum, a reduced classification-exception rating, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and new commodity rates subject to minima of 20,000 and 30,000 pounds, from 14 points of origin in trunk-line and New England territories to 24

destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. The rates under the proposed classification-exception rating, minimum 20,000 pounds and the proposed commodity rates, minimum 20,000 pounds, were the equivalent of approximately 47.5 percent of the first-class rates, and the proposed commodity rates, minimum 30,000 pounds, were approximately 45 percent of the first-class rates.

[fol. 23] Upon protests of the western trunk-line rail carriers, operation of the proposed schedules was suspended until February 20, 1941, and subsequently the operation of the schedules was postponed indefinitely by the respondents. At the hearing the rail carriers, the only protestants, withdrew from the proceeding after the respondents had agreed to make applicable in connection with the proposed commodity rates, minimum 30,000 pounds, a tariff provision reading: "Shipments on which freight charges are based on a weight of not less than 30,000 pounds must be received at and transported from the point of origin from one shipper in one day and on one bill of lading."

In its prior report herein, 31 M. C. C. 193, division 3 did not find that the level of the rates, that is, 45 percent of first class and 47.5 percent of first class, was unjust or unreasonable, but, in effect, found that either basis of rates subject to a minimum of 30,000 pounds was unjust and unreasonable. The proposed schedules to the extent found not just and reasonable were ordered canceled without prejudice to the establishment by respondents of truckload rates, minimum 20,000 pounds, which were not less than 45 percent of the corresponding first-class rates.

At the oral argument counsel for respondents stated that respondents had not established rates on linoleum equal to 45 percent of first class, minimum 20,000 pounds. A check of the tariffs discloses that from the points of origin herein involved to points in Iowa, Kansas, Missouri, and Nebraska the present rates are column 50-K, minimum 20,000 pounds, 47.5 percent of first class, but to points in Minnesota and South Dakota the rates are 45 percent of first class, minimum 20,000 pounds. As stated in the prior report the corresponding rail rates were reduced from 45 percent of first class, minimum 30,000 pounds, to 42.5 percent thereof, minimum 30,000 pounds. Prior to finding the proposed

rates, minimum 30,000 pounds, unjust and unreasonable, division 3 said:

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight [fol. 24] at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The respondents and the intervening motor carrier publishing agents, hereinafter referred to collectively as the motor carriers, contend that the views of division 3 are at variance with our views in *Carpets and Carpeting, Official & Southern Territory*, 237 I. C. C. 651, and that the finding of division 3 herein should be reversed. On oral argument counsel for the motor carriers stated, "We rest our case on a proposition of law essentially which is that motor carriers, when lawfully meeting a subnormal railroad rate, may at-

tach to their rate the same incidents as are attached to the railroad rate in the matter of the minimum weight requirement." On brief under the heading "The Ultimate Question Presented" it is stated, "Motor carriers may distinguish between small loads and larger lot shipments in their rates. The resulting inequality of charge per 100 pounds as between shippers is not inherently unlawful. May not the lowest of such motor carrier rates, when dictated by competitive necessity, be governed by minimum weight corresponding to the established trade unit of shipment by railroad facilities as reflected in the competitive railroad carload rate even if, for any reason, accommodation of that minimum quantity by motor vehicle calls for an overflow or follow-lot regardless of a relative unit operating cost on the overflow compared with a single full load? The question assumed proper policing rules to avoid abuse."

In *Carpets and Carpeting, Official to Southern Territory, supra,* relied upon by the motor carriers, we had under consideration, among other things, the lawfulness of proposed motor common carrier rates on linoleum from official to southern territory. Certain motor common carriers proposed therein to retain a column 50 rating, minimum 15,000 pounds, and to establish certain rates, minimum 30,000 pounds, the same as or generally 1 cent higher than the column 45 rail or rail-water rates. At pages 657 and 658, we said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

[fol. 25] With respect to the truckload rates proposed in the proceeding cited, we found:

that the postponed schedules of the motor-carrier respondents have not been shown to be unreasonable or otherwise unlawful except to the extent (a) that they propose to retain a minimum of less than 20,000 pounds, (b) that they provide rates subject to a minimum of 30,000 pounds which are lower than the corresponding proposed carload rates for application jointly by railroad and water carriers hereinabove found not shown to be unreasonable or otherwise unlawful, and (c) that a rule is not provided in connection with the column 45 basis to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

On brief the motor carriers refer to many of our former reports wherein railroad rates based upon minimum weights in excess of the loading capacity of cars have been found unreasonable. They contend that, for the most part, such findings were necessary because shippers under the tariff provisions have been required, when the prescribed minimum weight exceeded the quantity capable of being loaded in a single freight car, to pay either the less-than-carload rate on that portion of the shipment loaded in the second car or the carload rate on the minimum weight on the second car, irrespective of the weight of the portion of the shipment transported therein. Therefore, the shipper suffered financial injury. They assert that such cases are not in point because the shipper by motor vehicle pays charges based upon the rate and the actual weight of shipment, provided that weight exceeds or equals the minimum weight, and that, since the shipper does not suffer financial injury, he has no interest in whether one or more vehicles are used to transport the shipment.

The motor carriers also refer to former reports wherein we have declined to give our approval to trainload or multiple-car rates, because to do so would unduly prefer the large shipper to the prejudice of the small shipper. Many of these reports are discussed in *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485, hereinafter called the *Molasses case*. In that proceeding the then carload rate on blackstrap molasses in tank cars from New Orleans and Harvey, La., to Peoria and Pekin, Ill., was 17.5 cents and the rail carriers proposed to establish

a rate of 14 cents, minimum 1,800 tons, equivalent to 38.5 tank carloads, to meet the competition of cargo movements by private barge. The railroads established that their operating costs per 100 pounds would be less, when a single consignment of approximately 38 tank carloads of molasses was transported at one time in a single train, than when the commodity was transported in a single carload. However, the proposed rate was not a trainload rate but a quantity or multiple-car rate. We found therein, at page 502:

> [fol. 26] We find that there is nothing unlawful in the establishment of railroad rates on a quantity larger than a carload, when moving as a single shipment, where, as here, they are designed to meet competition from other modes of transport whose unit of transportation is not limited to single carloads, provided a just and reasonable relation in rates as between the larger and smaller quantities of the same traffic is maintained. We further find that the proposed reduction in rates in this instance for quantity movements is greater than necessary to meet the competition confronting the respondents; that the reduced rate is unreasonable low and does not bear a just and reasonable relation to the existing carload rate on the same traffic between the same points; and that it is, therefore, unlawful.
>
> An order will be entered requiring the cancelation of the schedules under suspension without prejudice to the establishment of a quantity or multiple-car rate on the traffic in question no lower than 15 cents, subject to a minimum of 1,800 tons to be shipped under one bill of lading from one consignor to one consignee at one time, which we find to be a reasonable minimum rate.

It is contended by the motor carriers that in the *Molasses case* we found, in effect, that trainload or multiple-car rates, which were lower than reasonable carload rates on the same traffic and which under our prior reports would have been found unduly preferential, were preferential, but not unduly so, as the result of the presence of competition. They also maintain that the finding therein was based solely upon the presence of the element of competition and that the fact that it was shown that the cost per 100 pounds

which would be incurred in handling a single shipment of molasses in quantities of 1,800 tons, would be less than the cost incurred in handling a carload shipment was not a material factor in the decision and was of no legal importance. The record herein does not show the costs incurred in handling 30,000 pounds or 20,000 pounds of linoleum, and, under the theory of the motor carriers, if competition exists between the rail and motor carriers, such costs are immaterial.

On linoleum the proposed rates, minimum 20,000 pounds are the equivalent of column 47.5 rates and the proposed rates, minimum 30,000 pounds, approximate column 45 rates. The rail carriers, when the proposed schedules were filed, maintained rates based upon column 45, minimum 30,000 pounds. The motor carriers assert that they are entitled to enter into competition with the rail carriers, and that the only way this can be done is to establish the identical rail carload rate and minimum weight. They say that if the same rate is established, subject to a lower minimum, the motor carriers would be indulging in a destructive competitive practice, which would cause the railroads in turn to reduce their carload rate to meet the truck rate and lower minimum weight, and that the result would be that a competitive equilibrium would never be achieved. [fol. 27] The National Industrial Traffic League maintains that the findings of Division 3 are sound and should be affirmed, and that the policy announced by division 3, set forth in the foregoing quotation from its report, is in keeping with the rule of rate making in section 216(i) of the Interstate Commerce Act. The National Industrial Traffic League contends that we should adopt this policy as our own.

At the oral argument, a representative of all of the manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound and request that we affirm the findings of division 3.

The interpretation placed upon our findings in the *Molasses case* by the motor carriers is erroneous. In that proceeding, we authorized the establishment of a multiple-car rate, minimum 1,800 tons, on molasses which was lower than the then carload rate of 17.5 cents. We thus accorded

a lower rate to a number of carloads tendered as a single shipment. This was a departure from our prior findings that the maintenance of a trainload rate lower than a carload rate was unlawful because it was unjustly discriminatory. Our finding in the *Molasses case* was not based solely on the existence of water competition, but also upon a showing that the circumstances and conditions surrounding the transportation of multiple-car shipments of molasses differ materially from those encountered in the transportation of a single carload of molasses, with the result that there existed a material difference in the costs of service per 100 pounds. Such differences in transportation conditions and costs in our opinion prevented the discrimination caused by the lower multiple-car rate when compared with the carload rate from being unjust discrimination and, therefore, the multiple-car rate approved by us was lawful.

This interpretation of our findings in the *Molasses case* is in consonance with the interpretation placed upon those findings in *Petroleum Rail Shippers' Assn.* v. *Alton and S. R.*, 243 I. C. C. 589. In the latter proceeding after giving consideration to the question of authorizing multiple-car rates on petroleum, we found among other things, that the record failed to establish that there was a substantial difference between the costs per 100 pounds in transporting a multiple-car shipment and a single carload. We also found that there was insufficient evidence concerning the advantages and disadvantages of multiple-car transportation as compared with single-car transportation to justify affirmative findings as to whether or not multiple-car rates on petroleum lower than those applicable to single carloads would be lawful.

Under section 216(i) of the act, we are required, in determining the lawfulness of motor common carrier rates, to give due consideration, among other factors, "to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service." Under the [fol. 28] rates proposed by the respondents, a shipper of 20,000 pounds of linoleum from Boston, Mass., to Dodge City, Kans., 1,819 miles, would be required to pay a rate of $1.67 which would return to the carrier a revenue of 18.4 cents a truck-mile. A shipper of 30,000 pounds would pay a rate of $1.57. If 20,000 pounds of the shipment at

the rate of $1.57 were to move in one truck, and a second truck were to be used for the transportation of the remaining 10,000 pounds, the carrier would receive revenues per truck-mile of 17.3 cents on the first truck and 8.6 cents on the second truck. If the 30,000-pound shipment were to be transported in two trucks, and 22,000 pounds were to be loaded in the first and 8,000 pounds in the second, the revenues per truck-mile to the carrier under the rate of $1.57 would be 19 cents for the first truck and 6.9 cents for the second. In both of the examples given, the carrier would have space available in the second truck in which less-than-truckload shipments could be transported, but it is doubtful whether less-than-truckload shipments from Boston to Dodge City or between intermediate points always would be available.

The rates and carload minimum weights of rail carriers are fixed with relation to conditions surrounding transportation in rail service. The primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment. Except in unusual circumstances, such as those presented in the *Molasses case*, minima in excess of the weight which can be loaded in a single car have been condemned.

In fixing motor carrier rates lower than those for application on less-than-truckload shipments, the shipper must be required to tender to the motor carrier a specified minimum weight before the shipment is entitled to the lower rate.

With respect to linoleum, the minimum truckload weight established by the motor carriers between the points herein is 20,000 pounds. This truckload minimum weight was determined upon a consideration of the loading characteristics of the commodity and the size of truck ordinarily used in its transportation. Although 22,000 pounds can be loaded in respondents' trucks, the minimum of 20,000 pounds is not to be condemned because some reasonable leeway may be allowed between the truckload minimum weight and the maximum carrying capacity of the truck. This maximum carrying capacity is the amount which can be carried under the laws of the States through which the trucks move.

Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding [fol. 29] a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload. In the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.

The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does

not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination.

We are mindful of the fact that we approved certain rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra.* However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, but that for the future we shall follow the policy announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

Upon oral argument, we find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots. We further find that the proposed rates would be unreasonable to the extent they exceed rates 45 percent of the first-class rates from and to the same points subject to a minimum of 20,000 pounds. Respondents should establish rates 45 percent of first class, minimum—

[fols. 30-31] With respect to the question of reasonableness, division 3 found that rates 45 percent of first class, minimum 20,000 pounds, were not unreasonably low. This record does not establish that rates 47.5 percent of first class, minimum 20,000 pounds, would exceed a maximum reasonable basis. Both bases of rates, 45 and 47.5 percent of first class, are within the zone of reasonableness.

Upon oral argument, we affirm the prior findings of division 3 that the proposed rates 45 and 47.5 percent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 percent of first class, are subject to a minimum of 30,000 pounds.

We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 percent of first class, minimum 20,000 pounds, or 47.5 percent of first

class, minimum 20,000 pounds. As respondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary.

LEE, *Commissioner*, dissenting in part:

This proceeding was reopened by the Commission on its own motion to afford all interested parties an opportunity to present oral argument on the question of the soundness of the "policy" announced by division 3 in the prior report with respect to minimum weights which may be established by motor carriers. I do not approve the adoption of that policy. In my opinion, under the act, the determination by us of whether a motor-carrier rate, or the minimum to which it is subject, is unreasonable or unjustly discriminatory must be based, not upon the application of an arbitrary policy, but upon careful consideration of all the circumstances and conditions shown to affect the transportation by motor carriers of the particular commodity or commodities on which such rate and minimum weight would apply.

I concur in the finding that both bases of rates, 45 and 47.5 percent of first class, are within the zone of reasonableness. The tariff provision which respondents agreed to make applicable in connection with the proposed commodity rates, minimum 30,000 pounds, removed protestants' objections thereto. It would effectively prevent favoritism in the application of these rates.

Commissioners ROGERS and ALLDREDGE dissent.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 22] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA

Now comes the United States of America, defendant in the above entitled case, and in answer to the petition therein says:

1. Admits the allegations of paragraphs I and II of the petition;

2. Admits the allegations of paragraph III. For further answer thereto, it alleges that the motor carrier rates involved in this case were considered by Division 3 of the Interstate Commerce Commission jointly with certain other similar motor carrier rates in proceedings entitled *Rugs and Matting from the East to Western Trunk Line Territory* (Investigation and Suspension Dockets No. M-1216 and No. M-1445) (plaintiff's exhibit A); that in such proceedings Division 3 found those rates to be unreasonable only to the extent that their application was subject to the existence of a minimum weight of 30,000 pounds rather than 20,000 pounds; that the full Commission in its decision of August 11, 1942 (plaintiff's exhibit B) considered only those rates which were involved before Division 3 as Docket No. M-1216 and did not consider the rates involved before [fol. 33] Division 3 under Docket No. M-1445; that the full Commission affirmed the prior findings of Division 3 that the proposed rates were unreasonable only to the extent that they were subject to a minimum of 30,000 pounds and further found that the proposed rates to the extent that they were subject to the minimum of 30,000 pounds would give an unjust advantage to shippers of 30,000 pound lots and would be unjustly discriminatory to shippers of 20,000 pound lots.

3. Admits the allegations of paragraph IV of the petition except that it alleges that in the official report finally adopted by the full Commission the last paragraph upon sheet 8 as set forth in plaintiff's exhibit B beginning, "Upon oral argument we find * * *" was deleted. Plaintiff's exhibit B must, therefore, be considered as having been thus modified.

4. Admits the allegations of paragraph V of the petition and for a more complete statement of the matters contained therein refers the court to the reports of the Commission (plaintiff's exhibits A and B).

5. Admits the allegations of paragraph VI of the petition except that it alleges that in the second line thereof the order of Division 3 is incorrectly stated as having been issued on November 17, 1942, whereas it was in fact issued on November 17, 1941.

6. Denies the allegations of paragraph VII of the petition except as they are consistent with the statements made in the reports of the Commission herein, and particularly denies that the decision of the Commission as to unjust advantage and unjust discrimination as between shippers is, as a matter of law, erroneous on its face.

7. Admits the allegations of Paragraph VIII, but alleges for further answer to said paragraph that the report of the full Commission (plaintiff's exhibit B, sheet 6) states that, "At the oral argument, a representative of all of the [fols. 34-35] manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound, and request we affirm the findings of Division 3."

8. Denies the allegations of paragraphs IX through XIII of the petition except as they are consistent with the statements made by the Commission in its two reports (plaintiff's exhibits A and B) and particularly denies the several allegations in said paragraphs that the Commission acted illegally and in excess of its power.

9. Denies the allegations of paragraph XIV of the petition.

Wherefore, it is respectfully prayed that the petition be dismissed.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Thurman Arnold, Assistant Attorney General.

I hereby certify that a copy of the foregoing answer was this day mailed to each of the following persons:

Charles E. Cotterill, Esq., 70 E. Forty-fifth Street, New York, New York.

Nelson Thomas, Esq., Interstate Commerce Commission, Washington, D. C.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

October 23, 1942.

[fol. 36] In District Court of the United States for the Southern District of New York

[Title omitted]

Answer of Interstate Commerce Commission—Filed October 26, 1942

Comes now the Interstate Commerce Commission (hereinafter called the Commission), one of the defendants herein, and for its answer to the complaint filed in the above-entitled proceeding respectfully shows:

1. For the purposes of this suit the Commission admits that the allegations of paragraphs I, II, III, IV, V and VI of the complaint are true, except that the Commission denies that the copy of the report of the Commission dated August 11, 1942, Exhibit B to the complaint, is a true or correct copy of the said report as entered by the Commission, in that the last paragraph on sheet 8 of said Exhibit B does not appear in the report as entered by the Commission; (a certified copy of the report as entered is attached hereto as Exhibit No. 1 to this answer); and except that the Commission also denies that said report, Exhibit No. 1 to this answer, was predicated upon new and different findings [fol. 37] from the report and order of November 17, 1941, by Division 3, as alleged in paragraph III of the complaint, and the Commission alleges and shows that the full Commission in its report adopted and affirmed the order of Division 3 for the reasons stated in the Division 3 report and also upon additional findings and conclusions of unjust advantage and unjust discrimination, as set out in said Exhibit No. 1 hereto. That for full and complete information as

to the findings and conclusions of the Commission in both of said reports, the Court is respectfully referred to the said reports, Exhibit A to the complaint and Exhibit No. 1 to the Commission's answer herein.

2. Answering paragraphs VII, VIII, IX, X, XI, XII and XIII of the complaint, the Commission alleges and shows that said paragraphs are, and each of them is, argumentative; that the statements as to the findings and contents of the Commission's reports do not amount to a full, true or correct statement of the contents of said reports and order, for which this defendant respectfully refers the Court to the full text of the same, Exhibit A to the complaint and Exhibit No. 1 to this answer, and the Commission denies the allegations of said paragraphs as to the alleged errors, insufficiencies and deficiencies of the said reports and order.

3. Further answering the allegations of the complaint, the Commission alleges and shows that the tariff schedules effective August 24, 1940, referred to in paragraph III and elsewhere in the complaint, were, upon protests of divers parties, made the subject of an investigation and suspension proceeding before the Commission, pursuant to paragraph (g) of section 216 of Part II of the Interstate Commerce Act, designated "I. & S. Docket No. M-1216, *Rugs and Mattings from the East to Western Trunk Line Territory.*" [fol. 38] The proceeding relative to the other tariff schedules which prescribed rates to be effective January 25, 1941, also referred to in paragraph III and elsewhere in the complaint, was designated "I. & S. Docket No. M-1445, *Linoleum and Related Articles from the East to Ohio.*" All the schedules involved in both proceedings prescribed for hard-surfaced floor coverings, commonly called linoleum, rates amounting to 70 percent of first-class rates between particular points of origin and destination for shipments under 20,000 pounds, 47½ percent of first-class rates for shipments between 20,000 and 30,000 pounds, and 45 percent of first-class rates for shipments of 30,000 pounds and over; that on March 21, 1941, hearings were held in both proceedings at Columbus, Ohio, at which evidence was taken and submitted to Division 3 of the Commission; thereupon, on November 17, 1941, upon all of said evidence, Division 3 disposed of both proceedings in a single report and order,

a copy whereof is attached to the complaint herein as Exhibit A; that in said report the Commission, by its Division 3, held that the proposed rates of 45, 47.5 and 70 percent of first-class rates were just and reasonable, except as to the 30,000-pound minimum, in which respect they were found to be unreasonable to the extent that it exceeded 20,000 pounds; that thereupon, upon petition of plaintiff herein, the Commission ordered a reconsideration as to the proceeding designated I. & S. Docket No. M-1216 by its entire membership, and the questions involved were fully briefed and argued before it on May 28, 1942; that the Commission on August 11, 1942, made its report (Exhibit No. 1 to this answer) in which it affirmed the findings of Division 3 and found further that the proposed 30,000-pound minimum for the 45 percent rate would be unjustly advantageous to shippers of 30,000-pound lots and unduly discriminatory and prejudicial to shippers of 20,000-pound lots, thus [fol. 39] affirming the order of Division 3 cancelling the said schedules as to the 30,000-pound minimum upon the grounds not only of unreasonableness, but also of unlawful preference and prejudice.

The Commission further alleges and shows that in the proceedings in which the Commission's reports and order were made and entered, the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearings provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said reports and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the plaintiff by its counsel; that in briefs filed in said proceedings and in oral argument, questions relating to said matters were fully argued and submitted to the Commission for determination, including questions raised by the plaintiff in this suit; that thereupon the Commission determined said matters and entered and served upon the plaintiff and other interested parties in the proceeding its reports and order; that said reports and order included the Commission's findings of fact, conclusions and requirements in both proceedings aforesaid, and that upon the evidence aforesaid the Commission made the findings and

stated the conclusions upon which said order and the affirmance thereof by the full Commission are based.

The Commission further alleges that the findings and conclusions in said reports support the order here in question and that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence adduced in said proceeding.

[fol. 40] The Commission further alleges that in making and affirming said order, it considered and weighed carefully each fact, circumstance and condition disclosed by the evidence presented to it by the parties to the proceeding and their respective counsel, including matters covered by the allegations of the complaint herein.

The Commission further alleges that said order was not made or entered by it either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support and warrant it and the findings upon which it was based; that in making said order the Commission did not exceed its authority, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the complaint in so far as they conflict with the allegations herein or with the statements, findings, determinations or conclusions stated in the Commission's reports attached to the complaint as Exhibit A and to this answer as Exhibit No. 1, which said reports, together with the order issued therewith, are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove.

Wherefore, the defendant prays that the complaint herein should be dismissed.

Interstate Commerce Commission, By Nelson Thomas, Attorney, Room 3329, Interstate Commerce Bldg., Washington, D. C. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fols. 41-41a] *Duly sworn to by Clyde B. Aitchison. Jurat omitted in printing.*

[fols. 42-42a] I hereby certify that I have this day mailed a copy of the attached answer of the Interstate Commerce Commission and exhibit thereto to the following:

Robert L. Pierce, Esq., Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Charles C. Cotterill, Esq., 70 East 45th Street, New York, N. Y., Attorney for Plaintiff.

This 24th day of October, 1942.

Nelson Thomas.

[fol. 43] IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

In the above-entitled cause, the Court makes the following findings of fact:

1. Plaintiff, for the purposes of this suit, is the legal representative of certain common carriers of property for hire by motor vehicle in interstate commerce and has brought this suit to set aside and annul a certain order of the Interstate Commerce Commission, pursuant to the provisions of the Act of October 22, 1913, (C. 32, 38 Stat. 219, U. S. C. Title 28, sec. 47).

2. Said order, which required the plaintiff and the motor carriers joining in certain rates proposed by them to cancel the same, was made in a proceeding designated Investigation & Suspension Docket No. M-1216, *Rugs and Matting from the East to Western Trunk Line Territory*, and was accompanied by two reports in which the Commission found that said proposed rates were unjust, unreasonable and un- [fol. 44] justly discriminatory. Said reports are reported 31 M. C. C. 193, and 34 M. C. C. 641.

3. That in said proceeding the plaintiff and the motor carriers proposing said rates were accorded a full hearing by the Commission and were permitted to introduce such competent and relevant evidence as they saw fit to

adduce, written briefs and oral argument were received, and upon said evidence, briefs and argument, the Commission made its reports and order.

4. Upon the pleadings, the evidence received by the Commission in the aforesaid proceeding, a certified copy of which has been received in evidence by the Court, and the arguments of counsel, the Court finds that the facts found and reported by the Commission in its said reports were supported by substantial evidence, and the Court adopts said findings as its own.

Conclusions of Law

The Court states the following as its conclusions of law:

1. The Commission's report and order of August 11, 1942, and its prior report of November 17, 1941, were justified by law and the evidence before the Commission, and constitute a valid exercise of the Commission's power under the Interstate Commerce Act.

2. The findings set forth in the Commission's report hereinabove designated, considered as a whole, are sufficient to sustain and warrant the order made by the Commission directing the cancellation of the rates involved in this suit.

3. The evidence heard and considered by the Commission as set out in the transcript thereof, which was introduced in evidence by the plaintiff in this Court, is sufficient in law [fols. 45-46] to sustain the Commission's order in said proceeding and a finding by this Court that said order is supported by substantial evidence.

4. The construction of the law applied by the Commission in its reports and order was and is correct.

5. The record of the proceeding before the Commission indicates that the plaintiff and the motor carriers proposing the rates involved in said proceeding have been accorded the full hearing required by law.

6. The relief which the plaintiff prays should be denied and its suit dismissed for want of equity.

Augustine N. Hand, United States Circuit Judge.
John W. Clancy, United States District Judge.
Edward A. Conger, United States District Judge.

Dated: February 9, 1943.

[fol. 47] In United States District Court, Southern District of New York

C. 19-390

Eastern Motor Carriers' Association, Plaintiff,

against

United States of America and Interstate Commerce Commission, Defendants

Before Augustus N. Hand, Circuit Judge, and Clancy and Conger, District Judges

Charles E. Cotterill, Attorney and Counsel for Plaintiff and Supporting Intervenors.

Thurman Arnold, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, for the United States.

Nelson Thomas, Attorney for Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel, of counsel.

Opinion

Augustus N. Hand, Circuit Judge:

This is an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission which held certain proposed motor carrier tariffs unlawful upon a finding that the rates were unjustly discriminatory to certain shippers. The commodity to which the rates were to be applied was hard surfaced floor covering. The railroads have a rate of 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for 30,000 pounds or [fol. 48] more. The motor carriers proposed a rate of 45% of first-class on shipments weighing 30,000 pounds or more; a slightly higher rate (47½% of first-class) for shipments weighing between twenty and thirty thousand pounds; and a rate of 70% of first-class on shipments of less than 20,000 pounds.

The Commission referred with evident approval to the prior finding of Division 3 of the Commission which read as follows:

> "The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight

cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truck-load minimum weight. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment."

The Commission went on to affirm prior findings of Division 3 that proposed rates of 45 and 47.5 per cent of first-class are not unjust or discriminatory except to the extent that the proposed rates, 45 per cent of first-class, are subject to a minimum of 30,000 pounds.

It made further findings as follows:

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

"As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 per cent of first class, minimum 20,000 pounds, or 47.5 per cent of first class, minimum 20,000 pounds. As re- [fol. 49] spondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary."

The difficulty with adoption of a rate of 45 per cent on a minimum of 30,000 pounds, when that rate is not allowed to smaller shippers, seems to be that it has no relation to the business of the motor carriers, for they have made no showing of any saving when carrying more than 20,000 pounds. Nor have they showed that a 45 or 47½ per cent rate, or some intermediate rate, for anything beyond 20,000 pounds would not enable them to maintain reasonable competition with the railroads.

The finding that rates of either 45 or 47½ per cent of first-class, minimum 20,000 pounds, would not in themselves be unreasonable does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment. If motor carriers can make money either at 45 or 47½ per cent of first-class, it would seem that the Commission might reasonably require that the advantage given to the larger shippers of over 30,000 pounds should be shared with the smaller shippers of less than 30,000 pounds, since there is no showing that such sharing would work to the unreasonable disadvantage of the carriers, and it clearly would give the smaller shippers the benefit of the lower rate which the larger shippers would enjoy.

As we have already suggested, the proposal of a 45 per cent rate for shipments in excess of 30,000 pounds has no apparent relation to the business needs or the convenience of transportation of the motor carriers. It is a mere adoption on a volume basis of rates for railroad carload lots which have been sanctioned in the case of rail carriers. It is evident that the motor carriers are attempting to com- [fol. 50] pete with the railroads on rates for large shipments and at the same time to make additional profits on smaller shipments by the 47½ per cent rate. Competition between rail and motor carriers may be entirely legitimate, and indeed desirable, provided a greater equality in rates can be preserved between the smaller and the larger shippers. The extent to which competition should be recognized in arriving at just rates is, within reasonable limits, a matter for the expert judgment of the Commission. It does not in itself necessarily determine whether a rate is preferential under Section 3 of the Interstate Commerce Act or unreasonable under Section 1 (5). It is a matter to be given weight by the Commission, rather than an absolute defense. I. C. C.

v. Alabama Midland Ry., 168 U. S. 144, 166; United States v. Illinois Central R. Co., 263 U. S. 515.

The effect of requiring the motor carriers to fix a single low minimum quantity adapted to their equipment is to oblige them, if they are to meet railroad competition, to extend to smaller shippers the advantages of the competitive rate. No reason is advanced why this should not be done in this case. The 45 per cent rate is found to be reasonable and compensatory; there is nothing to show that hardship would result to the carriers from extending a 45 per cent rate, or one between 45 per cent and 47½ per cent, to small shippers as well as to large ones. It appears to us that in deciding this case the Commission has met the requirements of Section 216 (i) of the Motor Carrier Act, in that it has given "due consideration * * * to the inherent advantages of transportation by such carriers, (and) * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the [fol. 51] lowest cost consistent with the furnishing of such service * * *". Its disposition of the proceeding before it was right and should be affirmed.

Submit proposed findings upon ten days' notice.

Judgment for the defendants, dismissing the complaint.

Augustus N. Hand, U. S. C. J. Edward A. Conger, U. S. D. J. John W. Clancy, U. S. D. J.

[fols. 52-52g] In United States District Court, Southern District of New York

Civil Action No. 19-390

Eastern-Central Motor Carriers Association, Plaintiff,

Middle Atlantic States Motor Carrier Conference, Inc., Central States Motor Freight Bureau, Inc., Intervening Plaintiffs,

vs.

United States of America and Interstate Commerce Commission, Defendants

Decree and Judgment—Filed March 5, 1943

The above-entitled cause came on for final hearing on November 2, 1942, before a statutory court convened pursuant to the provisions of 28 U. S. C. 41 (28), 43-48, the

parties plaintiff and defendant appearing by their respective counsel, and the Court having received evidence offered on behalf of said plaintiffs and being fully advised in the premises, and on February 9, 1943, having made and filed its findings of fact, conclusions of law and opinion herein, it is therefore

Ordered, Adjudged and Decreed, That the prayer of the plaintiff's herein be, and the same is hereby denied and the suit dismissed at the plaintiff's costs.

This March 5, 1943.

Augustus N. Hand, United States Circuit Judge.
John W. Clancy, United States District Judge.
Edward A. Conger, United States District Judge.

[File endorsement omitted.]

[fol. 53] In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors—Filed May 5, 1943

Now come Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., Central States Motor Freight Bureau, Inc., petitioners herein, and present with their petition for appeal herein this their assignment of errors and say that in the record and proceedings in the above-entitled cause and the decree made and entered against them therein on the 5th day of March, 1943, and the final order in the cause denying rehearing on the 17th day of March, 1943, there is error in the particulars hereinafter set forth.

The District Court of the United States for the Southern District of New York erred in making the decree and in dismissing the petition herein in the following respects:

1. It erred in determining that the order of the Interstate Commerce Commission made on November 17, 1941 was within the authority of the Commission and was supported by evidence of record before the Commission.

2. It erred in the failure to state and decide the contentions of petitioners as to the respects in which such order

of the Commission was beyond its authority and not supported by any facts of record before the Commission.

[fol. 54] 3. It erred in holding as a matter of law that there is "discrimination between classes of shippers" within the reach of U. S. Code Title 49, Sec. 316(d) when common carriers by motor vehicle in their tariffs offer to any shipper choice of three different rates per 100 pounds dependent only upon the weight tendered for shipment by such shipper at one time on one bill of lading, there having been no finding by the Commission that either the lowest or next lowest of the three rates depend upon the shipment of quantities greater than within the economic reach of ordinary shippers and there having been no finding by the Commission that the offering of such choice of three rates was a device by means of which some shippers obtained and others were denied by motor carriers the benefit of the lower charges.

4. It erred in determining that while each of the three rates so offered by the motor carriers was, as concluded by the Commission, just and reasonable, discrimination between classes of shippers would exist as forbidden by law because it did not appear that the motor carrier costs of operation would be lower when transporting the largest of the three quantities upon which application of the lowest of the three rates would depend.

5. It erred in determining that while the lowest of the three offered rates (dependent upon the tendering of the largest of the three quantities) corresponded to the railroad carload rates and minimum carload weights and that the motor carriers were meeting such railroad competition thereby, yet that the privilege of meeting such competition with railroads on equal terms may lawfully be denied by the Commission as "discriminatory" between "classes of shippers tendering the different weights" when it does not appear that the difference in rates is measured by differences in operating costs of the motor carriers.

6. It erred in concluding that "within limits" it is for the Interstate Commerce Commission to determine under what [fol. 55] circumstances competition between motor carriers and railroads suffices as a basis for rate distinctions made available to any shipper and dependent only on the weight

of individual shipments that any such shipper might tender at one time.

7. It erred in determining that motor carriers may not lawfully offer in their tariffs to any shippers a choice of three rates dependent upon the quantity tendered for shipment at one time for the reason that if the motor carriers can "afford" the lowest of the three rates they "ought not" to be allowed to obtain the "greater profit" on the next highest rate for the next smallest quantity offered, in the absence of evidence of a difference in carrier operating expense, even though the lowest of the three rates dependent upon the largest of the three shipping weights may be made for competitive reasons to correspond to the railroad carload rates and carload minimum weights.

8. It erred in failing to conclude that in respect to its administrative function of recognizing or not recognizing competition between regulated common carriers as a basis for rate distinction it is imperative that the Interstate Commerce Commission make suitable findings as to the facts and reasons allowing or disallowing the defense of competition in any particular case.

9. It erred in failing to conclude that the Commission gave no reason and made no finding whatsoever as to why in this case the defense of competition was insufficient, and hence that the Commission's action was arbitrary.

10. It erred in failing to set aside the order of the Commission on the ground that the Commission itself declared its disregard of the defense of competition in this instance was only a matter of "policy".

[fol. 56] 11. The court erred in substituting its own judgment for the administrative judgment of the Commission by upholding the Commission's order on the further ground (not employed by the Commission itself) that the offering to any shippers the choice of three rates was conducive to "inefficiency" of motor carrier operation.

12. It erred in failing to set aside the order of the Commission on the ground that it was in law "arbitrary" and beyond the authority of the Commission and without support in the evidence before the Commission.

Wherefore, petitioners pray that said decree entered herein on the 5th day of March, 1943, and the final order of

March 17, 1943, denying rehearing thereof be reversed and that said District Court of the United States for the Southern District of New York be directed to enter a decree granting the petition of petitioners and that said order of the Interstate Commerce Commission be declared void and perpetually set aside, suspended and annulled and that your petitioners be granted such other and further relief as may be appropriate.

(Signed) Charles E. Cotterill, Solicitor for Petitioners.

May 5, 1943.

[fols. 57-59] In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal—Filed May 7, 1943

Upon the entering of the final decree in this cause came Charles E. Cotterill, solicitor and counsel for petitioner, and intervening petitioners, and filed their assignment of errors and petition for appeal, and it is hereby—

Ordered, That an appeal by petitioners in the above entitled cause to the Supreme Court of the United States from the final decree heretofore filed and entered herein on March 17, 1943, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal being hereby made returnable as required by law.

It is further ordered that the bond on appeal be and it is hereby fixed at the sum of two hundred fifty dollars ($250).

Augustus N. Hand, U. S. C. J.; Edward A. Conger, U. S. D. J.; John W. Clancy, U. S. D. J.

May 6, 1943.

[fols. 60-61] PLAINTIFF'S EXHIBIT NO. 1

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. M-1216

In the Matter of: RUGS & MATTING, EAST TO WESTERN TRUNK LINE TERRITORY

Public Utilities Commission of Ohio,

Columbus, Ohio,

March , 1941.

Met, pursuant to notice at 10:00 o'clock a. m.
Before U. E. Conlon, Examiner.

APPEARANCES:

J. E. Haydon, 486 North Main St., Akron, Ohio, appearing for Eastern-Central Motor Carriers Association, Respondent.

L. M. O'Leary, 16th and Central, Fort Dodge, Iowa, appearing for Brady Transfer & Storage Company, Respondent.

W. M. Spaulding, 821 La Salle St. Station, Chicago, Ill., appearing for Chicago, Rock Island & Pacific Railway Co., Protestant.

James A. Gillen and Henry Christianson, 5[illegible] W. Jackson Boulevard, Chicago, Ill., appearing for Western Trunk Line Carriers, Protestants.

[fol. 62] PROCEEDINGS

Exam. Conlon: The Interstate Commerce Commission has set for hearing at this time and place I. & S. Docket No. M-1216, Rugs and Matting, East to Western Trunk Line Territory. This case was formerly assigned before Examiner Borroughs on January 30th and postponed for hearing on March 21st, 1941, before Examiner Conlon.

May I have the appearances for the respondents in this case?

Mr. Haydon: J. E. Haydon, on behalf of the Eastern-Central Motors Carriers Association, Akron, Ohio. I have been admitted to practice before the Commission.

Exam. Conlon: Any further appearances for the respondents in this case?

Mr. O'Leary: L. M. O'Leary, Fort Dodge, Iowa, appearing for the Brady Transfer & Storage Company, of Fort Dodge, Iowa.

Exam. Conlon: Any further appearances for respondents?

(No response.)

May we have the appearances for the protestants in this case?

Mr. Gillen: Henry Christianson and James A. Gillen, 547 West Jackson Boulevard, Chicago, Illinois, appearing on behalf of the Rail Carriers Trunk Line Committee; both admitted to practice and are in the hearing room.

Exam. Conlon: Both are present?

Mr. Gillen: Both are in the hearing room.

[fol. 63] Exam. Conlon: Any further appearances?

Mr. Spaulding: W. M. Spaulding, 821 South LaSalle Street Station, Chicago, Illinois, appearing on behalf of Chicago, Rock Island & Pacific Railway Company.

COLLOQUY

Exam. Conlon: Any further protestants in this case?

(No response.)

Mr. Haydon: May we go off the record for a moment please?

Exam. Conlon: Off the record.

(Discussion had outside the record.)

Exam. Conlon: On the record. Any further protestants in this case?

(No response.)

Are there any interveners in this case?

(No response.)

This Docket will be recessed until such time as we finish Docket No. M-1445, and will be again called at that time.

(At 10:15 o'clock a. m. a recess was taken until 4:15 o'clock p. m.)

Exam. Conlon: The hearing will please come to order.

We will proceed now with Docket No. I. & S. M-1216, Rugs and Matting, East to Western Trunk Line Territory. You may proceed, Mr. Haydon.

Mr. Haydon: Mr. Examiner, before calling my witness in this case, I would like to refer to a letter which appears in the Commission's files, from Chairman J. A. Farmar, of the Western Trunk Line Committee, dated January 2nd, 1941, in which the rails, who, incidentally, filed the protest which [fol. 64] resulted in the suspension of the rates in I. & S. Docket 1216, agree that if the respondents will incorporate a note reading as follows: "Shipments on which freight charges are based on a weight of not less than 30,000 pounds must be received at and transported from the point of origin, from one shipper in one day and on one bill of lading," and if the respondents would petition the Commission for vacation of the order in this case and request authority to incorporate in the suspended schedules the note which I have just quoted, they would be willing to withdraw their protest.

We want to go on record at this time as being entirely agreeable to the incorporation of such a note, in connection with the suspended rates, and, as a matter of fact, we have so agreed in two petitions, which we have previously filed for vacation of the order herein.

Now, we are again agreeing to incorporate such a note, and it is my understanding that the rails that are present here today, are here to substantiate the willingness to withdraw the protest as indicated in Chairman Farmar's letter, on January 2nd, 1941.

Mr. Gillen: The statement made by Mr. Haydon is correct. In other words, the position of the rail carriers, who are members of the Western Trunk Line Committee, protestants, is that they have no objection to the publication of Column 45, "Rates," subject to 30,000-pound minimum with the note which Mr. Haydon referred to as being applicable to those rates.

[fol. 65] Mr. Haydon: And might I ask at this point, isn't it true that your protest in this case was directed to the 30,000-pound, Column 45, rate?

Mr. Gillen: That is correct.

Exam. Conlon: Insofar as protestants in this case are concerned, it is satisfactory to the rails if that rule is put in?

Mr. Gillen: That's correct.

Exam. Conlon: Off the record.

(Discussion had outside the record.)

Exam. Conlon: Off the record.

Mr. Gillen: I would like to make a correction in that statement that I previously made, and where I said Column 45 rate, I referred to the rates which were protested in the protest filed by the Western Trunk Line Committee.

Mr. Haydon: Which reflected Column 45.

Mr. Gillen: That is correct.

Mr. O'Leary: Which we understand, in a measure, are the equivalent of—they were made the basis of Column 45.

Mr. Gillen: Based on commodity rates.

Mr. O'Leary: To the other territories it is all 59K, which is 47½.

Mr. Gillen: Yes.

Exam. Conlon: Do you have anything to say?

Mr. Spaulding: That is our position, also.

Mr. Haydon: Now, Mr. Examiner, with that understand- [fol. 66] ing, apparently we will still have to proceed to introduce evidence, bearing on the reasonableness of the rates, which are under suspension.

Exam. Conlon: That's right.

Mr. Haydon: For the reason that the Commission now has before it a petition to vacate the order, and in that petition it was pointed out that the protestants have agreed to the same thing which is agreed upon here, and yet the Commission did not lift its order, so, we are prepared to proceed and show what, in our opinion, at least, very definitely proves the reasonableness of the suspended rates, and to do that I will call Mr. O'Leary.

Exam. Conlon: You may proceed.

Mr. Haydon: I will pass out these exhibits 1, 2, 3, 4, and 5, first, and I will ask the reporter to mark them for identification at this time.

(Exhibits 1, 2, 3, 4, and 5, inclusive, Witness O'Leary, were marked for identification.)

L. M. O'LEARY was sworn and testified as follows:

Direct examination.

By Mr. Haydon:

Q. Mr. O'Leary, have you given the reporter your name and address?

A. The name is L. M. O'Leary, Fort Dodge, Iowa.

Q. With whom are you connected?

A. With the Brady Transfer & Storage Company.

[fol. 67] Q. In what capacity?

A. General traffic manager.

Q. As traffic manager——

A. Yes, sir.

Q. Are you required, among other things, to establish rates for application over your line?

A. Yes.

Mr. Christianson: The protestants admit Mr. O'Leary's qualifications. Very glad to do it.

Exam. Conlon: It is so stipulated, then.

By Mr. Haydon:

Q. Mr. O'Leary, have you prepared an exhibit showing the present rates on linoleum under suspension herein, with the proposed rates and the present rail rates from New York, Philadelphia, and Boston, to points in the Western Trunk Line Territory?

A. I have, in Exhibit 1, of three pages, I have shown the present rates to the thirty-four towns in Western Trunk Line Territory. The first statement being from New York, as representative. Philadelphia as representing that district which includes Camden and Marcus Hook and Boston, which includes East Walpole as origin. I have shown the mileage taken from the Hobman's Guide. The present rate on the basis of 20,000 pounds——

Q. At Column 50?

A. —at Column 50 there is four corrections with the rates in there, the present rates to Minneapolis, Minnesota Trans-[fol. 68] fer, St. Paul, and Sioux Falls, South Dakota, have been changed on September 25, 1940, and put in another tariff and made Column 55. These rates should be to the Twin Cities $1.31; to Minneapolis, Minnesota Transfer, and St. Paul, $1.31, and $1.42 to Sioux Falls.

The proposed rate, as shown on 20,000 pounds, on 30,000 pounds, and the mile earnings are based on 22,000 pounds, which is the average loading from the Eastern Territory on this hard-surface floor covering, and the last column is the rail rate.

Q. Now, in every instance, Mr. O'Leary, doesn't your exhibit show that the present rail rate is lower than either your 20,000-pound or your proposed 30,000 pounds?

A. Yes, the proposed rate on 20,000 pounds is based on Column 50K, which is 47½ cents per first-class. On the 30,000-pound proposed basis it is on Column 45. The rail basis to these thirty-four points is equivalent to Column 42½.

Q. Which basis was permitted to go into effect through the Commission's decision in I. & S. Docket No. 4766?

A. 4766?

Q. And 4767.

A. And 4767. To the other portions of the territory, Western Trunk Line Territory—is that under suspension, that I know of, or just these commodity rates? Aren't our exceptions under suspension, also?

[fol. 69] Mr. Haydon: Possibly at this time, Mr. Examiner, we probably should state what is in issue. I don't believe we did that.

Exam. Conlon: No, you didn't.

Mr. Haydon: The matter under suspension is an exceptions rating of Column 50K, minimum 20,000 pounds, named in Agent Everett H. Russell's MF ICC No. 7.

The Witness: Is that No. 7?

Mr. Haydon: That was the exceptions tariff in effect prior to his present exceptions, MF ICC No. 31. In addition to his Column 50K rating, minimum of 20,000 pounds, there is also under suspension the matter of specific commodity rates named in Item 1141-10, Supplement 125, of Agent Russell's MF ICC No. 26. These specific commodity rates reflected on 20,000 pounds, Column 50K, and on 30,000 pounds, Column 45. It was necessary to establish specific commodity rates on the basis of Column 50K, minimum 20,000 pounds, to the points at issue for the reason that we were at the same time publishing Column 45, minimum 30,000 pounds, and in order for the two bases to alternate, we had to publish specific column 50K rates, which we otherwise would have had under the proposed exceptions Act.

Now, the Commission has suspended the exception rating Column 50K, along with the specific commodity rates, which, likewise, reflect Column 50K along with the commodity rates which reflect Column 45, with a minimum of 30,000 pounds.

[fol. 70] Exam. Conlon: All right, proceed.

By Mr. Haydon:

Q. Now, Mr. O'Leary, in connection with that Exhibit No. 1, will you state for the record what it actually cost you on an average to handle traffic between points in the East and points in Western Trunk Line Territory?

A. In truckload it will average just one fraction over 15 cents per truck mile.

Q. On truckload?

A. Yes, sir.

Q. How did you arrive at that figure?

A. We segregated part of it on some of our owner-operator, and then we tried some of it, not segregating all of them, but all the loads, to arrive—but, what we did was take as the owner-operator, we have to pay three cents a running mile; that is why we can take care of the mileage now; $5.75 for the tractor and $1.25 for the trailer; these aren't our figures; these we call the Eleven States Agreement. I have added to that everything in our operating statement, with the exception of equipment, maintenance, and depreciation expense. In other words, I put in there the terminal expenses, as well as tariff and advertising, insurance, safety expense, and the administration expense.

Q. Now, Mr. O'Leary,——

A. That brings it down to 15.155, and that includes the terminal expense we have to pay on LTL shipments.

[fol. 71] Q. But it doesn't include the handling of less-than-truckload traffic?

A. It does include the handling of less-than-truckload traffic at terminals.

Q. Why does the figure that you just mentioned, differ from the figure which you introduced in another case today?

A. That differs because included in that latter figure you spoke of, our twenty-one certificated regular routes in Northwest Iowa and between Nebraska and Iowa, where we make these little towns, four, five miles apart, where the cost of delivering and the hours we have to pay in addition

to the three cents a mile, is more than the driving cost, where we pay $3.75 for the driving cost; on a typical run we would pay $4.00 in addition, at 80 cents an hour at the time he was loading and unloading, or delivering at the stores. There are two hundred and twenty-five towns in those twenty-one routes, and about 75 per cent of them, it is all small towns, we don't have a dock. We don't have an agent. We deliver direct to the consignee by our road truck, and that, of course, brings the mileage cost up considerably.

Q. Is there any rate on your Exhibit No. 1, which does not yield over and above your actual expense per mile, in handling truckload traffic?

A. It does not. There isn't a figure on there that would. There are two spots on the 30,000 pounds, based on the 20,000 pounds that would be less than our average for the [fol. 72] year 1940, and that would be from Boston; three of them; from Boston to Cedar Rapids, Chillicothe, Missouri, and Ottumwa, Iowa.

Q. But the figure that you referred to, 17.——

A. —548.

Q. Included your handling of less-than-truckload traffic, and included the handling of traffic over your docks?

A. Oh, yes, indeed.

Q. Whereas, with respect to these rates under suspension there is no handling over the dock, no terminal expense, is that correct?

A. The only terminal expense that there would be, would be the supervision and the billing.

Q. Which attach to every transaction?

A. Yes; the terminal expense runs high, runs better than three cents over the entire system.

Q. So, your rates shown on Exhibit No. 1, not only are higher than your out-of-the-pocket cost, but they are higher than your cost, including all items of cost, and they do yield a profit?

A. Yes, sir, they will.

Q. Do you have another exhibit showing the rates that were formerly in effect?

A. Yes, I have Exhibit No. 2, that shows the comparison of the respondents' present suspended rates, on hard floor coverings, with rates in effect prior to July 10th, 1940, and on July 10, 1940, the commodity rates then in effect in Rus- [fol. 73] sell's Tariff MF ICC No. 26, were cancelled.

Q. Why were they cancelled, Mr. O'Leary?

A. We wanted to meet the rail rate on the nose, as far as rates were concerned, but kept the minimum at 20,000 pounds. We increased the rates and increased the minimum.

Q. At the time a proposal was filed to cancel the then existing commodity rates, wasn't it a fact that the rail basis was Column 50?

A. It was.

Q. And your proposal contemplated the elimination of all your commodity rates in effect at that time, so as to place your rates on the same level as the then existing rail rates?

A. The same level, only a minimum of 20,000 instead of 30,000 pounds.

Q. Then, after the cancellation of the commodity rates, which you previously maintained, and which are shown——

A. In Column 2.

Q. —in Column 2, on Exhibit No. 2, didn't the rails reduce their classification basis to Column 45?

A. Yes, they did and to thirty-four towns they also put in the commodity rate at approximately 42½.

Q. Of course, those commodity rates were suspended?

A. Yes.

Q. But on the Column 45 classification basis it did go into effect?

A. Yes.

[fol. 74] Q. And left you then with Column 50, as against the rail column, 45?

A. Yes, and against the motor classification basis 45, we couldn't use it, it was suspended.

Q. You couldn't use it, as I understand it, because your bottom class rates in Russell's Tariff were Column 50.

A. Yes.

Q. Then, though you had 45, in which classification it was of no use to you——

A. No use to us.

Q. Then, to equalize the situation brought about by the publication of Rail Column 45, did I understand that you attempted to establish specific commodity rates?

A. We put in commodity rates to the thirty-four towns in Western Truck Line territory, where the rails put in rates on the basis of 42½, we put in two rates, one on

30,000 pounds, Column 45, and to the same towns, 20,000-pound minimum, Column 50K, or Column 47½.

Q. Mr. O'Leary, your previous commodity rates in effect on July 10th, 1940, carried with them the minimum weight of 18,000 pounds, did it not?

A. Yes, sir.

Q Isn't it true, also, that your proposed commodity rates from, for example, Boston, Massachusetts, on Exhibit No. 2, based on 20,000 pounds, are in every instance higher than the commodity rates which you maintained [fol. 75] prior to July 10, 1940, with 18,000-pound minimum?

A. Not in every instance. In all but three instances from Boston, they were; to Kansas City, St. Jo, and Springfield, they are the same.

Q. But in every instance——

A. Were the specific commodity rate; they were.

Q. With respect to your proposed 30,000-pound rate, isn't it a fact that they were closely approximate the commodity rates formerly in effect; that is, the difference isn't over two or three or four cents?

A. That's true. They run—they are not over two or three cents' difference.

Q. That is true throughout the Exhibit; isn't that right?

A. That is true; $1.13 to Sioux City, and we had $1.10 in.

Q. Isn't it true that if you had no desire to bring your rates up to the rail level, which was in effect prior to July 10, 1940, and had maintained your then existing commodity rates, that you would have a basis on 20,000 pounds lower than proposed in this proceeding?

A. We would have a basis of 18,000 pounds lower than in this proceeding.

Q. Yes, and you would have rates with 18,000-pound minimum on a very, a slightly in excess of the 30,000-pound rates?

A. In larger towns, in Omaha, Sioux City would be less than the proposed 30,000.

[fol. 76] Q. Now, on Exhibit 3——

A. Exhibit No. 3 is a statement showing the suspended rates on the twenty and thirty thousand pounds from Boston, East Walpole, Kearny, and New York, as representative with the rates published by Keeshin, and in effect today, Agent D. O. Barrett, in his MF ICC No. 36, on 18,000-pound minimum.

Q. Now, these rates shown on this exhibit, for the account of the Keeshin Motor Express Company, are the same as you formerly maintained, prior to July 10, 1940.

A. Where we voluntarily cancelled on July 10th, 1940.

Q. Keeshin didn't go along with you and still maintains his rate?

A. And still maintains his rate.

Q. So, Keeshin has 18,000-pound rates, which are lower than your 20,000-pound rates?

A. That is true in every instance.

Q. And Keeshin does handle traffic from points in the East to the Western Trunk Line Territory?

A. Yes, into the Twin Cities. In this case, our proposal to Minneapolis should be changed to St. Paul; that is all. We show $1.20, like from Kearny to New York, to the Twin Cities. Our lowest rate would be $1.21. It is the lowest rate we have got now, but this is the one that is suspended, I would say the difference between what Keeshin has now and what we have now, he got $1.12 against our $1.21.

[fol. 77] Q. However, the exhibit is O. K.?

A. The exhibit is O. K.

Q. Turn to Exhibit 4.

A. That is the comparison with Eastbound rates, on dairy products, compared with hard-surface floor covering.

Q. You handle a considerable quantity of dairy products from points in the West to Eastern territory?

A. Yes, we do.

Q. Do you care to indicate, approximately, the percentage of your total eastbound traffic, represented by the movement of dairy products?

A. Eastbound traffic to the Atlantic Seaboard, from points West of the Mississippi River, are 92 per cent in 1940, was dairy products.

Q. The large preponderance of your tonnage, then, constitutes dairy products?

A. Dairy products, yes.

Q. So, on your Exhibit No. 4, as I understand the exhibit, you compare your westbound suspended linoleum rates with your eastbound presently effective dairy product rates?

A. Yes.

Q. Isn't it true that in only four instances are your present dairy product rates, eastbound, higher than both of your suspended westbound linoleum rates?

A. That is correct.

[fol. 78] Q. Isn't it also true that in many instances your eastbound dairy products rates are the same as, or lower than, your suspended westbound 30,000-pound linoleum rates?

A. They are.

Q. And those instances are indicated on the exhibits, as I understand by the underscored figures.

A. Yes, the last column.

Q. That is the last column under Boston, and the last one under New York, and the last under Philadelphia?

A. Yes.

Q. Now, in connection with your movement of eastbound dairy products, isn't it true that you provide refrigeration?

A. We do.

Q. And your minimum is only 18,000 pounds?

A. No, the minimum has now become 20,000 pounds.

Q. From all points shown on this exhibit?

A. I believe you will find the dairy products have gone to 20,000 pounds all over.

Q. In no instances, in excess of 20,000 pounds?

A. No.

Q. However, you aren't able to state definitely it is 20,000?

A. I will state definitely that in every territory in the Western Trunk Line, except in this case where the rates to the East are exactly the same rates from Iowa, Nebraska, Minnesota, and North and South Dakota, the rates are rail [fol. 79] rates, plus five cents per hundred on the minimum.

Q. In other words, the rates eastbound have been based on rail rates, either the same as the rail or five cents over?

A. I said Nebraska—I want to take out two towns, Falls City and Omaha, were left on the rail basis without the five cents.

Q. Then, according to the exhibit, isn't it true that your earnings on westbound linoleum, under the suspended rates, would be higher than the earnings on your eastbound dairy products movement?

A. They would for 1940, but if we handled the same amount of linoleum as we handled for dairy products for the

same distance, for the same rates, we would have made $39,850, because that is what we paid for dry ice.

Q. As I understand it, the preponderance of your tonnage moves eastbound?

A. The preponderance of our tonnage is dairy products moving eastbound.

Q. Doesn't the preponderance of your tonnage move eastbound; far more eastbound than you do westbound?

A. From this territory, yes.

Q. Although eastbound tonnage, I understand, 90 per cent constitutes dairy products?

A. 90 per cent west of the Mississippi River, going East to the Atlantic Seaboard.

Q. Now, your Exhibit No. 5.

[fol. 80] A. Exhibit No. 5 is the statement showing a comparison of present and proposed rates on hard-surface floor covering, from Boston, Massachusetts, with—which includes, of course, East Walpole—with the present rates on fresh, frozen, or salted fish, from Boston, Massachusetts to points in Western Trunk Line Territory. We have shown, the first rate there; the commodity rates, on 22,000 pounds from various points in this district. The second is the exception rate, of Column 50, on 20,000 pounds. The third column are the present rates on hard-surface floor covering, and the last two columns are rates on proposed and suspended linoleum rates.

Q. Referring to the first point, Atchison, Kansas, your present linoleum rate is $1.32?

A. Yes.

Q. Your present fresh fish rate, in the reverse direction,—no, in the same direction——

A. Same direction.

Q. Pardon me. —is $1.32?

A. Yes.

Q. In other words, you maintain today the same rate on linoleum as you do on fresh fish; is that correct?

A. That's correct.

Q. Now, can you handle, or do you handle, 22,000 pounds of fresh fish?

A. We do.

Q. You handle 22,000 of linoleum?

[fol. 81] A. Yes.

Q. You ice the fish?

A. Yes.

Q. You ice linoleum?

A. We don't.

Q. In your opinion, should the earnings on—or the rate on linoleum from Boston to Atchison be higher than that on fresh fish?

A. It should be lower.

Q. It should be lower. Now, under your proposed linoleum rate it is $1.26 on 20,000 pounds, and $1.18 on 30,000 pounds?

A. That is Atchison, Kansas?

Q. Yes.

A. Yes.

Q. You consider those rates entirely proper, by your present rates on fish, from Boston to Atchison?

A. I think they are fairly comparable, and reflect the difference in transportation costs.

Q. Not so much handling involved in the movement of linoleum as there is in the movement of fish, is there?

A. There isn't, and there is no hazard. As you move fish, the fish have to — kept at 20 degrees above zero.

Q. You do handle fish from Boston to the Western Trunk Line Territory?

A. Yes.

[fol. 82] Q. How much of your total is fish?

A. I couldn't give you that. In 1940 handled 19,940,000 pounds of fish from Boston; not this entire territory.

Q. The big percentage of your total movement is fish?

A. A thousand truckloads; pretty close to it.

Q. Kansas City, Missouri, your present linoleum rate is $1.32, and your present frozen fish rate is $1.18.

A. Yes.

Q. You are 14 cents higher on linoleum than you are on fish to Kansas City?

A. Yes, I get it; Kansas City, that's right.

Q. What rates are you proposing on linoleum from Boston to Kansas City?

A. $1.26 on the 20,000 pounds; $1.18 on the 30,000 pounds, which latter rate is applicable on fresh fish, frozen, on the basis of 22,000 pounds.

Q. So, your proposed present rate on 20,000-pound rate on linoleum from Boston to Kansas City is higher than your present fish rate from Boston to Kansas City?

A. Yes. I might explain, to keep the record clear, that the $1.18 is 22,000 pounds on fish, and these commodity

rates in the first column, we don't pay for the ice. We do for the rates in the second column, on 50. We don't pay for the ice on the others. We have a provision that the shipper should pay for the ice.

[fol. 83] Q. Do you have any further evidence?

A. I have nothing further.

Q. Let me ask you this question, please: Are you familiar with the Commission's decision in Docket No. 28041, involving rates on linoleum from Eastern producing points to points in the Southern territory?

A. Yes, I understand that they allow the rates on Column 45, minimum 30,000 pounds.

Q. To become effective by rail?

A. And motor carrier.

Q. And motor carrier?

A. Yes.

Q. With the understanding that a note similar to that stipulated in the record this morning, would be attached to the rates?

A. Yes, 30,000 pounds by motor carrier, and, I believe, it is no more than right that we should have such a stipulation, rather than take 10,000 one day and 20,000 the next.

Q. Mr. O'Leary, prior to the cancellation of your specific commodity rates on July 10, 1940, did you handle a substantial portion of the tonnage which moved by the motor carriers to Western Trunk Line points?

A. We had substantial tonnage. We handled in 1939, that is, the last full year, I believe it was 398 truckloads to Western Trunk Line Territory, to the origins, from Trunk Line, in New England.

[fol. 84] Q. In handling that, did you compete with other motor carriers operating to and from the same territory that you operated to?

A. Oh, yes.

Q. What were those carriers, the names of those carriers?

A. Well, there is Keeshin, is one of them; Ohio-Nebraska, is another one; probably a dozen of them.

Q. Did you compete with Cooper-Jarrett?

A. Yes, Cooper-Jarrett, Spector, Monark.

Q. Adams Transfer & Storage Company?

A. Adams Transfer & Storage Company.

Q. Of course, you can't put into this record the tonnage that those carriers handled, but you did compete with them

and you had to do your utmost in the solicitation of business to keep abreast with them, is that correct?

A. That's correct.

Q. Would you venture to suggest that these other carriers probably handled as much of this linoleum westbound, as you did?

A. Well, I couldn't say that; I don't know a thing about them, so, I'm not going to answer you.

Mr. Haydon: I believe that is all, Mr. Examiner.

By Mr. Haydon:

Q. Do you have anything to add?

A. Nothing to add. I might add one thing, that we had since these rates were suspended, four loads from the Western Trunk Line Territory, instead of 398, and three of those we haven't collected the charges on, because the rate was too high, and we haven't been able to collect the [fol. 85] charges.

Exam. Conlon: Gentlemen, do you have any questions?

Mr. Gillen: No questions.

Mr. Haydon: That concludes our case, and I ask that respondent's Exhibits 1 to 5, inclusive, be accepted in evidence.

Exam. Conlon: Any objection?

Mr. Gillen: No objection.

Exam. Conlon: No objections, Exhibits 1 to 5 will be received in evidence.

(Exhibits 1 to 5, inclusive, Witness O'Leary, received in evidence.)

Mr. Haydon: Now, Mr. Examiner, I would like to make another motion. I would like to move at this time that the Commission give immediate consideration to the vacation of their suspension order in I. & S. Docket No. M-1216, and particularly so since we have previously filed two petitions, asking for the vacation of this order, and to date we have submitted evidence to show that the suspended rates are reasonable and that they yield a profit over and above the cost of operation, and by reason of the fact that the rates are being denied to the respondents, these respondents are being injured in that they can't successfully compete, not only with the rails, but with the Keeshin Motor Express, who maintain rates on a lower level to many of the destina-

tions involved herein. In addition, the record shows that the protestants and respondents have reached an agreement, which permits the protestants to withdraw entirely any objections that they may have previously expressed. [fols. 86-86b] For that reason, I ask the Examiner to immediately refer this case to the Commission, with a view to having the suspension lifted immediately.

Exam. Conlon: The motion will be received, Mr. Haydon, and it will be given careful consideration.

Mr. O'Leary: May the record also show that the Brady Transfer & Storage Company joins in that motion.

Exam. Conlon: The record may so show.

Is there anything else to come before this hearing?

(No response.)

Let the record show that two free copies of the transcript are to be given to the parties. Mr. Gillen will be given one free copy for the protestants, and the copy for the respondents will go to Mr. Haydon.

There being nothing further, you may consider the case submitted.

(Hearing concluded at 5:15 o'clock p. m.)

[fol. 87] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY APPELLANTS AND THEIR DESIGNATION OF MATERIAL PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 11, 1943

I

The decision of the court below was not in any respect responsive to the contentions made by the appellants concerning the features of illegality of the report and order of the Interstate Commerce Commission.

II

The Commission selected this as a test case for its disposition of a very important matter of transportation rates. In clear intent and in fact its majority decision would cut across and condemn as unlawful a large part of the entire motor common carrier rate structure in this country. It would drastically alter the competitive rate equilibrium as between the motor carriers and railroads with respect to

much of the traffic now fairly shared between them. It would prevent achievement of a competitive equilibrium ex [fol. 88] cept by a virtual allocation of traffic as between the two different forms of transportation agencies which otherwise would be competitive—something entirely beyond the Commission's present authority.

III

With complete candor of chosen language the Commission in its report and order reveals that its stated ultimate conclusion of unlawfulness of the involved motor carrier rates was arrived at as a result of a "policy" of its own. But the Commission wholly lacked authority thus to impose a "policy" of its own creation, not found in any provisions of the statute which it administers. (*Southern Pacific R. Co.* v. *I. C. C.*, 219 U. S. 43; *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525). "Congress has made the policy judgment" (Mr. Justice Black in *I. C. C.* v. *Inland Waterways Corp.*, decided by the Supreme Court June 14, 1943). When, therefore, so boldly the Commision announced that its decision and order were the result of its own "policy" the validity of its action is not to be sustained merely because it couched its ultimate conclusion of illegality in the mere terms of the statute that the involved rates would be "discriminatory" and "unreasonable".

IV

Whatever may be the carriers' motive they are not guilty of unlawful "discrimination between shippers" merely by openly publishing in their tariffs a choice of three rates per one hundred pounds dependent only upon the quantity offered for shipment at one time on one bill of lading from one origin to one destination, when *any* shipper is at full liberty at any time and place to exercise its mere choice of shipping weight well within the limits of ordinary commercial units of sale. The Commission's majority decision to [fol. 89] the contrary was erroneous in the light of the Supreme Court's decisions in *Penn Refining Company* v. *Western N. Y. R. R. Co.*, 208 U. S. 208, 221; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42. The case is easily distinguishable from others in which both the Commission and Supreme Court have determined that the mere open tariff publication of a conditional choice of rates may nevertheless be unlaw-

fully discriminatory if the seeming choice is beyond the ordinary economic reach of all but a few and restricted type of shippers. (*U. S.* v. *Chicago Heights Trucking Company*, 310 U. S. 344; *B. & O.* v. *U. S.*, 305 U. S. 507). Here the Commission made no finding that there are any "classes" of shippers as between whom there are serious economic infirmities which would disenable any of them freely exercising the optional choice of rates. It was not found that anything would be granted to any shipper or class of shippers and *denied* to another. The fallacy of the Commission's conclusion of unlawful discrimination is the same as it would be to say that a retail drug store is "discriminating" between its customers by offering to sell one tube of toothpaste for 25¢ or two for 40¢. As there would be no discrimination in fact in such an unrestricted choice offered the purchaser there can be no proper conclusion of unlawful discrimination under the statute. Neither the Commission nor the Supreme Court found any fault with a similar choice of graduated rights in the *Mississippi Valley Barge Case*, 292 U. S. 282.

V

As to the conclusion of unreasonableness: the rates of 70 per cent, 47.5 per cent and 45 per cent of first class, in terms of per one hundred pounds, were deemed by the Commission neither too high nor too low. It was con- [fol. 90] cluded, however, that for the motor carriers to govern the lowest of the three rates by the requirement that not less than 30,000 pounds be tendered for shipment at one time on one bill of lading from one consignor to one consignee would be unlawful because "unreasonable". The point made by the Commission majority was that since the record failed to show the motor carriers' operating expense per one hundred pounds would be less when transporting 30,000 pounds than when transporting 20,000 pounds the lowest of any of the rates should not be conditioned by the requirement that more than 20,000 pounds shall be tendered as a single shipment. In short, as to customary trade units of commercial sale of various commodities the Commission majority would disallow to motor carriers the right to govern their quantity rates by the same requirements as to shipping minimums which govern railroad rates. Whereas railroad carload rates are governed by required minimum shipping weights which express the ordinary commercial

units of sale the Commission majority would force the motor carrier industry to make their quantity rates available to shippers on substantially less shipping weights than the ordinary units of sale. No reason or finding is set forth in support of this drastic conclusion other than the "policy" of the Commission to bring about the change. The only attempted support of that mere "policy" rests upon nothing more than the negative requirement that before motor carriers may govern their quantity rates by customary trade units of shipment it is incumbent upon them to establish that their operating costs per one hundred pounds are lower for the larger quantity. No injury to any shipper was found. No injury to the motor carriers was found. No requirement was imposed that motor carriers may not ac- [fol. 91] cept shipments weighing 30,000 or more pounds at one time. The Commission's majority decision would impose the inelastic rule (never heretofore applied to transportation rates) that a rate or regulation is lawful or not only in accordance with its relation to carrier operating expense. But there is no requirement in the statute that each and every transportation rate and regulation must be measured solely with respect to operating cost. Principles of freight classification in accordance with relative "values of service" and the adaptation of rates to competitive and commercial necessities and conditions would be forbidden under such a rigid application of the sole test of mere operating expense. Nothing in the statute reveals the Congressional intent that only cost accounting methods are to be applied in determining the reasonableness of transportation rates and regulations.

VI

In the case of *Barringer & Co.* v. *U. S.*, No. 520, October Term, 1942, the Supreme Court determined that railroads might adapt their rates to motor carrier competition within the limits allowed by the statute. There, the railroads were competing with motor carriers. Here the motor carriers are competing with railroads. 45 per cent of first class is the railroad rate basis on carload shipments of linoleum when offered in quantities of 30,000 pounds or more. The motor carriers seek to charge 47.5 per cent of first class on the smaller shipping weight of 20,000 pounds and to meet the railroad carload rates of 45 per cent on the larger shipping weight of 30,000 pounds. By the action of the Com-

mission majority in the present case motor carriers would be required either to make their 45 per cent of first class rates available on the smaller shipping weight of 20,000 pounds (being less than the railroad requirement) or else [fol. 92] to charge more than the railroad carload rates per one hundred pounds in consideration of the lower shipping weight. That requirement is purely "arbitrary" as denounced by the three Commission dissenters. It would take from the motor carriers the statutory right of fairly adapting their rates and regulations to their competitive necessities. Congress has not forbidden fair competition nor required unfair competition. In its declaration of "National Transportation Policy" (U. S. Code, Title 49, Sections 27, 301 and 901 Notes) Congress has forbidden only "destructive" competition. It has preserved the right of "fair" competition between transportation agencies. In the absence of specific findings as to competitive excesses it is required that the Commission recognize the right of fair competition. (*Mississippi Valley Barge Case*, 292 U. S. 282; *Milwaukee Coal Case*, 294 U. S. 299; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Scandrett Case*, 32 Fed. Supp. 995, affirmed 312 U. S. 661). Here the Commission found no forbidden excess of competitive effort by the motor carriers. It did not find threatened destructive injury to the railroads but on the contrary noted the withdrawal of railroad protest early in the hearing. It did not find any malicious purpose by the motor carriers. It did not find that the motor carriers had gone beyond what their competition with railroads required. It did not find that an undue burden on the other traffic of the motor carriers would be cast by this meeting of railroad competition on equal terms. It did not find that the legitimate competitive interests of the motor carriers would as well be served by different rates and minimum weights than those proposed. In short, the Commission merely determined a "policy" of its own not to recognize the competitive situation which the record before it presented.

[fol. 93]

VII

Relying upon *U. S. v. Ill. Cent. R. Co.*, 263 U. S. 515 the Commission majority rejected the consideration of competition only because of the assumption that in such decision the Supreme Court allowed it the right to recognize competition or not as it should please and without any

supporting findings. But the Supreme Court meant no such thing. It did not intend to give to the Commission an autocratic power of economic dictatorship over transportation rates. While allowing to the Commission a proper administrative function in determining the weight to be given to competition in rate making the Supreme Court never meant that the Commission may allow or reject competition in a purely arbitrary way, merely as a matter of its own "policy", without any adequate findings under the law to support its action in a given case.

VIII

The Commission did not put its decision upon any ground of efficiency or inefficiency of operation of motor carriers such as the court below suggested might have been a supporting ground for the Commission's decision.

Appellants designate the following portions of the record to be printed as material to the points upon which they rely:

1. The transcript of evidence taken before the Commission, omitting the tabular exhibits and the oral argument of counsel.
2. The report and order of Division 3 of the Commission.
3. The report of the full Commission.
4. The complaint to the United States District Court for the Southern District of New York.
5. Opinion of the District Court.
6. Appellants' Assignment of Errors.

Respectfully, Charles E. Cotterill, 70 East 45th Street, New York, N. Y., Attorney for Appellants.

[fol. 94] [File endorsement omitted.]

[fol. 94a] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED —Filed October 21, 1943

Pursuant to Rule 13, Paragraph 9, of the Rules of the Supreme Court appellees designate the following portions of the record to be printed in the above-entitled case, in

addition to those portions heretofore designated by appellants:

1. Answers of the defendants United States and Interstate Commerce Commission.
2. Findings of Fact and Conclusions of Law of the District Court.
3. Judgment of the District Court.

Charles Fahy, Solicitor General.

[fol. 95] October 20, 1943.

Charles E. Cotterill, Esq., 70 East 45th Street, New York, N. Y.

Re: Eastern-Central Motor Carriers Association, et al. v. United States and Interstate Commerce Commission, No. 105

Dear Mr. Cotterill:

I enclose herewith copy of designation of additional parts of the record to be printed. This was filed in the Supreme Court today. Please acknowledge receipt.

Sincerely yours, Charles Fahy, Solicitor General.

[fol. 96] [File endorsement omitted.]

[fol. 97] Supreme Court of the United States

Order Noting Probable Jurisdiction—October 11, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,597. Southern New York, D. C. U. S., Term No. 105. Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., and Central States Motor Freight Bureau, Inc., Appellants, vs. The United States of America and Interstate Commerce Commission. Filed June 16, 1943. Term No. 105 O. T. 1943.

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Office - Supreme Court, U. S.
FILED
JUN 16 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942 1943

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants.

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CHARLES E. COTTERILL,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-390

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

This action was instituted in the United States District Court for the Southern District of New York to annul, set aside and enjoin enforcement of an order of the Interstate Commerce Commission under United States Code and Sup. II. Title 28, Secs. 41 (27) and (28), 43, 44, 45, 45a, 46, 47, 47a, and 48. A statutory-three-judge court was convened to hear and decide the case and it entered its judgment March 5, 1943. In that said judgment it was ordered that the petition be dismissed. On March 6, 1943, petition for rehearing by that statutory court was filed. On March 17, 1943, the petition for rehearing was denied and the order of denial thereby became the final order of the court as of that date. Notice of appeal to the Supreme Court of the United States was given April 21, 1943, petition for appeal was filed May 5, 1943, and the order allowing appeal was signed May 6, 1943.

Jurisdiction of the Supreme Court of the United States to entertain this appeal direct from the District Court for the Southern District of New York arises from Secs. 210 (28 U. S. C. A. Sec. 47a) and 238 of the Judicial Code as amended (28 U. S. C. A. 345).

The assailed order of the Interstate Commerce Commission was affirmative in form and substance; and direct appeal to the Supreme Court arises from the decision and order of the District Court refusing to set aside, annul and enjoin enforcement of the Commission's order (*Alton Railroad Co.* v. *U. S.*, 315 U. S. 15; *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125).

Accompanying this statement of jurisdiction of the Supreme Court of the United States is a copy of the opinion in the cause rendered by the District Court for the Southern District of New York. That opinion does not reveal the grounds upon which the plaintiff appellants assailed the validity of the order and action of the Interstate Commerce Commission. The opinion of the District Court for the most part merely paraphrases the opinion of the Interstate Commerce Commission and concluded with the general determination that the Commission was "right".

By its order here sought to be reviewed the Commission erroneously refused a large number of interstate motor common carriers the right in their tariffs to make available to any individual shipper the option of shipping certain commodities under a mere choice of three different rates from any origin to any destination the choice of any such shipper to be governed only by the quantity of freight tendered by that shipper at one time on one bill of lading from itself to one consignee. While concluding that each of the three sets of rates would be just and reasonable in themselves it was erroneously held by the Commission that the motor carrier offer of the mere choice by any individual shipper would constitute "discrimination between classes

of shippers" in accordance with the shipping weights which they might "tender at one time". There was no evidence before and no finding by the Commission that the range of shipping weights upon which the choice of rates would depend exceeded the ordinary trade units of shipment of the particular commodities or that the choice of rates so offered would in practical effect operate as a device by means of which the lowest of the three rates would be accorded to some shippers and "denied" to others. While the lowest of the three rates, governed by the largest of the three specified minimum shipping weights, would correspond to the competing railroad carload rates and carload minimum weight that circumstance was unlawfully rejected by the Commission as a ground for the motor carrier rate distinction only as a matter of "policy" on the part of the Commission and without any other finding as to why the right to meet the competition did not exist. In upholding the Commission's point of view the court below wrongly considered that because the motor carriers "can afford" the lowest of the three rates they should not be allowed to retain "the larger profit" on the intermediate and slightly higher rate in the absence of a showing that differences in the motor carrier operating expenses existed. The court below also improperly added its own independent expression of judgment, without corresponding findings by the Commission, that it would be "inefficient" for motor carriers to publish a competitive rate conditioned upon the tendering of a quantity of freight somewhat greater than might be loaded in a single motor vehicle, notwithstanding the varieties of sizes of motor vehicles and the operation of state "trade barrier" laws would account for the need to place a small portion of some of the shipments into second vehicles.

CHARLES E. COTTERILL,
Solicitor for Appellants.

May 6, 1943.

APPENDIX "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

C. 19-390.

EASTERN MOTOR CARRIERS' ASSOCIATION, *Plaintiff*,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before: Augustus N. Hand, Circuit Judge, and Clancy and Conger, District Judges.

Charles E. Votterill, Attorney and Counsel for Plaintiff and Supporting Intervenors.

Thurman Arnold, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, for the United States.

Nelson Thomas, Attorney for Inerstate Commerce Commission, Daniel W. Knowlton, Chief Counsel, of counsel.

AUGUSTUS N. HAND, Circuit Judge:

This is an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission which held certain proposed motor carrier tariffs unlawful upon a finding that the rates were unjustly discriminatory to certain shippers. The Commodity to which the rates were to be applied was hard surfaced floor covering. The railroads have a rate of 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for 30,000 pounds or more. The motor carriers proposed a rate of 45% of first-class on shipments weighing 30,000 pounds or more; a slightly higher rate (47½% of first-class) for shipments weighing between twenty and thirty thousand pounds; and a rate of 70% of first-class on shipments of less than 20,000 pounds.

The Commission referred with evident approval to the prior finding of Division 3 of the Commission which read as follows:

"The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight grater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. The record indictates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment."

The Commission went on to affirm prior findings of Division 3 that proposed rates of 45 and 47.5 per cent of first-class are not unjust or discriminatory except to the extent that the proposed rates, 45 per cent of first-class, are subject to a minimum of 30,000 pounds.

It made further findings as follows:

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

"As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 per cent of first class, minimum 20,000 pounds, or 47.5 per cent of first class, minimum 20,000 pounds. As respondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary."

The difficulty with adoption of a rate of 45 per cent on a minimum of 30,000 pounds, when that rate is not allowed to smaller shippers, seems to be that it has no relation to the business of the motor carriers, for they have made no showing of any saving when carrying more than 20,000 pounds. Nor have they showed that a 45 or 47½ per cent rate, or some intermediate rate, for anything beyond 20,000 pounds would not enable them to maintain reasonable competition with the railroads.

The finding that rates of either 45 or 47½ per cent of first-class, minimum 20,000 pounds, would not in themselves be unreasonable does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment. If motor carriers can make money either at 45 or 47½ per cent of first-class, it would seem that the Commission might reasonably require that the advantage given to the larger shippers of over 30,000 pounds should be shared with the smaller shippers of less than 30,000 pounds, since there is no showing that such sharing would work to the unreasonable disadvantage of the carriers, and it clearly would give the smaller shippers the benefit of the lower rate which the larger shippers would enjoy.

As we have already suggested, the proposal of a 45 per cent rate for shipments in excess of 30,000 pounds has no apparent relation to the business needs or the convenience of transportation of the motor carriers. It is a mere adoption on a volume basis of rates for railroad carload lots which have been sanctioned in the case of rail carriers. It is evidence that the motor carriers are attempting to compete with the railroads on rates for large shipments and at the same time to make additional profits on smaller shipments by the 47½ percent rate. Competition between rail

and motor carriers may be entirely legitimate, and indeed desirable, provided a greater equality in rates can be preserved between the smaller and the larger shippers. The extent to which competition should be recognized in arriving at just rates is, within reasonable limits, a matter for the expert judgment of the Commission. It does not in itself necessarily determine whether a rate is preferential under Section 3 of the Interstate Commerce Act or unreasonable under Section 1(5). It is a matter to be given weight by the Commission, rather than an absolute defense. I. C. C. *v.* Alabama Midland Ry., 168 U. S. 144, 166; United States *v.* Illinois Central R. Co., 263 U. S. 515.

The effect of requiring the motor carriers to fix a single low minimum quantity adapted to their equipment is to oblige them, if they are to meet railroad competition, to extend to smaller shippers the advantages of the competitive rate. No reason is advanced why this should not be done in this case. The 45 per cent rate is found to be reasonable and compensatory; there is nothing to show that hardship would result to the carriers from extending a 45 per cent rate, or one between 45 per cent and 47½ per cent, to small shippers as well as to large ones. It appears to us that in deciding this case the Commission has met the requirements of Section 216 (i) of the Motor Carrier Act in that it has given "due consideration * * * to the inherent advantages of transportation by such carriers, (and) * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service * * *". Its disposition of the proceeding before it was right and should be affirmed.

Submit proposed findings upon ten days' notice.

Judgment for the defendants, dismissing the complaint.

AUGUSTUS N. HAND,
U. S. C. J.

EDWARD A. CONGER,
U. S. D. J.

JOHN W. CLANCY,
U. S. D. J.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1096.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, ET AL.

REPLY OF APPELLANTS TO THE MOTION OF APPELLEES TO AFFIRM THE FINAL JUDGMENT OF THE STATUTORY COURT.

CHAS. E. COTTERILL,
Attorney for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, ET AL.

REPLY OF APPELLANTS TO THE MOTION OF APPELLEES TO AFFIRM THE FINAL JUDGMENT OF THE STATUTORY COURT.

This is another case involving the validity of an order of the Interstate Commerce Commission. While clear in its statement of ultimate conclusions it, like some others recently before the Supreme Court, in respect to the findings, is cryptic in expression, in places very ambiguous, and in some essentials lacking any findings at all. Of the ten voting Commissioners three dissented. One spoke of the order as "arbitrary."

The matter involved is of exceptional importance to the entire motor carrier industry which now grosses nearly $1,000 million annually. The appellants here represent

much of it. The order in principle cuts deeply into the validity of the whole form and substance of the motor carrier national freight rate structure and is so intended by the Commission. Upon the outcome depends the future competitive place of that mode of transportation and the survival of our traditional national transportation policy which so much favors competition of a healthy sort.

The governing statute provides for review of the validity of the Commission's orders by a special statutory court; and it is further provided that direct appeal to the Supreme Court lies in such cases. This scheme of judicial review, particularly the right of direct appeal to the Supreme Court, reveals an important public policy. It revolves around the conception that comprehensive consideration and decision by the Supreme Court is deserved in these complex transportation rate cases because of their intrinsic importance and because of the guidance which such decisions of the Court furnish in the general administration of the statute.

The court below did not invalidate the Commission's order. But in its written opinion there is not even a statement, and much less discussion, of any ground of invalidity which the pleadings, briefs, and oral argument of the plaintiffs before it presented. That court preferred merely to adopt and paraphrase the Commission's own reports and to declare that in its judgment the action of the Commission was "right." No aid from the court's opinion, on the important issues involved, is therefore to be had.

Government counsel now move, nevertheless, to affirm. The mere right to file such a motion cannot be questioned but the propriety of its filing and thus forcing decision out of turn is doubtful in view of the nature of the case and the broad issues involved.

In the motion it is said that there is no "substantial question" presented. But that assertion of view rests upon the statement of contentions which appellants do *not* make; it omits to present the contentions which appellants *do* make; and it attributes to the Commission needed findings which

were *not* made. In short "if the issues in this case were framed as the motion frames them" the situation might be different. When, however, the real issues are stated, as they are about to be, it is believed the Supreme Court will determine that not only are the questions substantial but that there is no rational basis on which the Commission's decision and order can find support in the statute which it administers.

I.

THE ESSENTIAL FACTS.

As on most other commodities the railroads maintain two freight rates per 100 pounds on linoleum from eastern manufacturing points to the West. The lower of them (45 per cent of first class) applies when any individual shipper chooses to tender for shipment at one time 30,000 pounds or more on one bill of lading to one consignee at one destination. The other and higher rate (70 per cent of first class) applies when the individual shipper may tender for shipment any quantity less than 30,000 pounds.

On their part the motor carriers similarly filed with the Commission their own tariffs containing the same 45 per cent basis on individual shipments weighing 30,000 pounds or more and 70 per cent of first class on the smaller weight individual shipments. In addition, however, the motor carrier tariffs also provided a rate basis of 47.5 per cent of first class to be applicable when any individual shipper might tender as much as 20,000 pounds but not as much as 30,000 pounds on the one bill of lading to one consignee. That is to say, while meeting the railroad 45 per cent rates on the larger but normal weight shipments of 30,000 pounds or over and while meeting the railroad rates on the small weight shipments (70 per cent of first class) the motor carriers also undertook to make available an intermediate rate of 47.5 per cent for the *benefit* of those individual shipments having the substantial weights of 20,000 pounds or more up to but not including 30,000 pounds. The offer of

that choice of alternative rates and minimum weights was unrestricted. Any shipper, small or large, would be at liberty to use either rate at will, choosing for itself the weight to be shipped at any one time and paying accordingly.

No shippers protested or appeared in opposition at the hearing when the evidence was taken. The Commission initially suspended the operation of the new tariffs, pending hearing, only upon protest of certain western railroads who, however, withdrew early in the hearing upon clarification of the intended application of the proposed rates.

In their evidence before the Commission (here before the Court) the respondent motor carriers explained that linoleum shipping weights of 30,000 pounds or more are entirely normal and usual in that branch of industry as evidenced by the railroad carload rates of 45 per cent which are dependent upon the tendering of individual shipments weighing that much. It was further explained that for the motor carriers to share on equal terms and conditions with the railroads in the transportation of those heavier ordinary shipping weights it was necessary for them to publish in their tariffs the same as the railroad carload rates and minimum weights.

It was conceded that by reason of the operation of varying state "barrier" laws, and the consequent limitations upon the sizes of motor truck vehicles, accommodation of as much as 30,000 pounds of linoleum in one shipment from the East to the West would require the motor carriers to load no more than about 22,000 pounds in one vehicle and to load the overflow into a second vehicle in which the same or a different kind of freight of the same or other shippers would be transported. While thus the overflow would require the partial use of a second vehicle the facts of the case in that regard bear no resemblance to others in which the Commission has rightly forbidden preferential "trainload" or "multiple car" rates which only a few very large shippers could use.

The motor carrier offer of an intermediate rate of 47.5 per cent on shipments weighing between 20,000 and 30,000

pounds was said in the evidence only to be intended to attract shippers to the patronage of the motor carriers by making available the choice of a slightly higher rate in consideration of the somewhat lower minimum shipping weight of 20,000 pounds capable of being loaded into single vehicles.

While there is a material difference between the operating expense of transporting the small shipments (at the 70 per cent rates) and either the 20,000 or 30,000 pound shipments the difference between the 45 per cent and 47.5 per cent bases, with their respective differences in the required minimum shipping weights, was not sought to be predicated upon any showing of a difference in motor carrier operating expense per 100 pounds. That particular rate distinction is grounded only upon the force of competition between the motor and rail carriers because of which, with their somewhat smaller vehicles, the motor carriers with respect to normal trade units of shipment (30,000 pounds) seek to equalize their quantity rates with those of the railroads whose freight cars are somewhat larger than the individual truck trailers legally permitted to be used in some portions of the country.

II.

THE ULTIMATE CONCLUSIONS OF THE COMMISSION.

By way of ultimate conclusion Division 3 of the Commission (under the wrong designation of "findings") declared that each of the three motor carrier rates per 100 pounds was just and reasonable and otherwise lawful but that it would be unjust and unreasonable to govern either the 45 per cent or the 47.5 per cent rates by a minimum weight greater than 20,000 pounds. A permanent order of suspension was entered.

Review by the full Commission was had, without avail, although there had been a prior decision of the full Commission in an earlier case contrary to the view of Division 3 in the present case. Upon that review in the present case

ten Commissioners voted and three of them dissented. The decision in the other prior full Commission case was in terms reversed.

In its opinion and order in the present proceeding the majority of the full Commission affirmed the conclusion of Division 3 that either 45 per cent or 47.5 per cent of first class per 100 pounds would be just and reasonable. But it was further held to be unjust and unreasonable to govern the 45 per cent of first class rates by a minimum weight of 30,000 pounds or anything else in excess of 20,000 pounds.

The majority of the full Commission also concluded (unlike Division 3) that there would result unjust discrimination as between shippers should the motor carriers offer at the same time 45 per cent on individual shipments weighing 30,000 pounds or more and 47.5 per cent on individual shipments weighing between 20,000 and 30,000 pounds.

There was no determination that motor carriers may not lawfully transport, even though requiring the partial use of a second vehicle, individual shipments that might be tendered weighing as much or more than 30,000 pounds so long as the rate stated in the tariffs may not call for a minimum shipping weight greater than 20,000 pounds—that being the quantity which the Commission says may be loaded with the one truck vehicle.

And yet the Commission, by its final order in this case, would force the motor carrier to do either of two things: if they publish the same 45 per cent rate basis which the railroads do it would have to be made available on shipments of as little as 20,000 pounds whereas the railroad 45 per cent basis is applicable only to shipments of 30,000 pounds or more. That, in effect, would compel the motor carriers to do something *which their competition does not require* by affording to shippers a quantity rate corresponding to the railroad quantity rate but calling for a lesser weight to be tendered than the railroads require. It would put the railroads at a disadvantage and prompt them further to reduce their own rates per 100 pounds. (See *Re Coffee from Jacksonville*, 34 M. C. C. 625.) In the alternative

motor carriers would be required to forego an equality of rate per 100 pounds as between their services and those of the railroads by charging only the one rate of 47.5 per cent of first class to be governed by a minimum weight of 20,000 pounds even on the larger shipments of 30,000 pounds as against the lower railroad 45 per cent basis which is governed by the 30,000 pound minimum. As the well-established commercial trade unit of sale and shipment is 30,000 pounds the lower railroad rates, although governed by the 30,000 pound minimum, would attract most of the business.

It is therefore evident that the intent of the Commission majority is to prevent the achievement of a competitive rate equality between the railroads and motor carriers in respect to ordinary trade units of quantity shipments of freight in this country. To force the common carrier trucking companies out of that very large field of traffic, even though they can "afford it," is the real purpose to be deduced. The asserted predicate for it is solely the difference (not always so) in the sizes of trucks and railroad box cars as a consequence of individual and varying state "barrier" highway laws. At least that fact is pointed to by the Commission as the controlling reason for its decision.

III.

QUESTIONS OF LAW INVOLVED.

As the action of the Commission would, in principle, condemn a large part of the entire prevailing motor carrier rate structure on thousands of commodities throughout the United States and cripple the future course of the industry the matter is one of urgent importance both to the transportation agencies and the shipping public.

It is believed, however, that the Commission's order is not within its authority and grossly misconstrues the statute. Its validity is assailed on these specific grounds:

(a) In terms the Commission majority acknowledges that its decision is based upon "policy"—something which is wholly beyond its authority.

(b) The Commission does not possess a power of economic dictatorship to exclude common carriers by motor vehicle from sharing in the transportation of long-established trade units of quantity shipments although exceeding somewhat that may be carried only in a single truck.

(c) To condemn as unreasonable motor carrier rates on quantity shipments well within the limits of ordinary commercial trade units of sale and transportation, merely because individual motor carrier vehicles may not contain as much freight as individual railroad cars, is arbitrary and unreasonable, and the Commission's conclusion in that respect lacks any findings or substantial basis whatsoever in its reports or the record before it.

(d) The conclusion of unjust discrimination between shippers with respect to these three motor carrier rates and minimum weights is patently erroneous as a matter of fact and therefore as a matter of law. As each and every shipper may choose without restraint (actual or economic) whether to tender the one shipping weight or the other there can be no proper conclusion of discrimination between shippers.

(e) In rejecting totally the competitive situation between motor and rail carriers here involved the action of the Commission, on its face, was purely arbitrary and did not rest upon any findings made or rule of reason within its administrative authority.

(f) The court below improperly supported the Commission's order by its own interpolated conclusion that "efficiency of truck operation" was being promoted by the Commission.

IV.

ACKNOWLEDGMENT BY THE COMMISSION MAJORITY THAT ITS DECISION WAS BASED UPON "POLICY".

Three times heretofore the Supreme Court has declared the Commission is wholly without authority to enforce a "policy" of its own as distinguished from administration of the requirements of the Interstate Commerce Act:

> *Southern Pacific R. Co.* v. *I. C. C.*, 219 U. S. 43.
> *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 541, 554.
> *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.

Here, in the teeth of those controlling decisions, the Commission majority, *in terms*, says its own decision and order are the consequence of a "policy" which it has evolved. The language of Division 3 was: "We adopt as a policy the condemnation as unreasonable" of a motor carrier minimum weight calling for an overflow into a second vehicle although within established trade units of shipment. The full Commission majority upon review said: "We shall follow the policy announced in the prior report herein" with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

Therefore at the threshold of this case it is observable that the Commission has characterized its own action in terms convicting it of an intentional distortion of the provisions of the statute to serve a "policy" of its own. Not unnaturally there were a number of dissenters and one of them properly spoke of the majority action as "arbitrary".

It is the plain effort of the Commission majority to force motor carriers out of the "quantity" freight business. This it seeks to do by imposing upon them the requirement that their rates be governed by minimum weights measured solely by the existing carrying capacities of individual motor trucks although such minimum weights would be less than ordinary trade units of shipment call for. There is

left by the order to the motor carriers only the devil's choice of having but one quantity rate per 100 pounds (higher than the railroad rate) in consideration of the lower minimum, or else, while permitted to charge the same rate per 100 pounds as the railroads do, yet to make it available on a lesser quantity than the railroads require—a concession not necessitated by the force of competition and which would in turn necessitate an offsetting rate reduction by the railroads.

This revolutionary conception of national "policy" strikes at the foundations of the motor carrier industry and the stability of transportation as a whole.

Certain it is that the Commission's characterization of its action as one dictated by "policy" discolors the attempt on its part to make that policy effective by a mere ultimate conclusion of "unreasonableness" and "discrimination between shippers" unaided by any cogent supporting considerations.

V.

THE ULTIMATE CONCLUSION OF UNREASONABLENESS.

As stated, by way of ultimate conclusion, so arrived at as a matter of policy, the Commission majority asserts that it is "unreasonable" for motor carriers to govern their quantity rates by minimum weights somewhat greater than can be loaded into single motor vehicles. This view was declared although the quantity rates and condemned minimum weights would correspond not only to established trade units of commercial shipments but to the railroad carload rates and minimum weights. No fault was found with the stated rates per 100 pounds.

That is to say the Commission determined that the 47.5 per cent motor carrier rates to be governed by a minimum weight of 20,000 pounds (but applying as well to shipments of greater weight) *would not yield profits too high* nor be otherwise unreasonable. Similarly it determined that the

lower competitive 45 per cent rate basis would not be unjust and unreasonably low but disallowed the requirement that (like the railroads) it be available only on individual shipments weighing 30,000 pounds or more.

The court below (misreading the reports of the Commission) fell into the erroneous assumption that there are two classes of shippers, i. e. those who are "large" and those who are "small" and that the weights of their individual shipments are governed accordingly. (The Commission made no such finding and none would have been justified by the record before it.) Having indulged that error of mere assumption, contrary to the facts, the court below considered that motor carriers "ought not" to retain "the greater profit" from the 47.5 per cent basis since it was not shown that their operating costs are less per 100 pounds on 30,000 than on 20,000 pound shipments. The reasoning of the court below was that if motor carriers "can afford" 45 per cent rates for 30,000 pounds it would be unjust for them, without added expense, to make also *available* the slightly higher rates of 47.5 per cent to be governed by the 20,000 pound minimum. In that way the court below, without judicial authority, in effect condemned as unreasonably high the 47.5 per cent basis. The Commission itself did not so. A somewhat blurred confusion of questions of discrimination and reasonableness is revealed.

All of these seeming complications arise from one single circumstance. In stretching and straining to find some sort of legal predicate of "unreasonableness" for its mere "policy" the Commission and the court below involved themselves in a tangled skein of reflection. Years ago, soon after the Interstate Commerce Act was passed in 1887, Judge Thomas Cooley, the Commission's first Chairman, declared in a comprehensive opinion that quantity rates for railroad shipments were lawful *if* the required minimum weights be not greater than those conforming to the *usual* trade units of sale. Otherwise, he said in behalf of the Commission, the making of lower rates based upon such

large shipping weights as that only a few shippers could take the advantage offered by the tariffs would be unduly discriminatory and therefore not lawful. (*Providence Coal Company* v. *P. & W. R. Co.*, 1 I. C. Rep. 163). It was there indicated (years before motor truck haulage) that an appropriate minimum weight to govern railroad quantity rates would generally be a single carload. In later years the Commission with consistency stated and applied this same view *Anaconda Copper Mining Co.* v. *C. & E. R. Co.*, 19 I. C. C. 592; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458. The railroad claim of lower operating expense on multiple car shipments was rejected as immaterial. See however *Re Molasses*, 235 I. C. C. 485, where still later the further element of competition for large quantity shipments was recognized as between railroad and water carriers.

Government counsel, in their motion to affirm, here agree with the appellants that what the Commission is now attempting to do is to make applicable to motor carriers the doctrine that the minimum weight to be applied to their quantity rates shall conform only to the carrying capacities of the individual trucks generally in use; even when those minimum weights would be less than commercial trade units of shipment and notwithstanding the railroad rates and minima which reflect them. The legal error of that "policy" in reason and result is apparent.

When, years ago, the Commission so decided that railroad carload quantity rates should be governed by established commercial trade units of shipment not greater than individual railroad car capacities it was seeking only to prevent undue advantages being derived by the exceptionally large shippers whose units of sale might be greater than those of the general run of commercial establishments.

Here the motor carriers do not seek to violate the principle of that broad rule. There is no proposal by them here to establish minimum weights larger than the ordinary commercial units of sale. No "multiple truck" rates are in-

volved such as "multiple car" rates of railroads that have long been condemned. There is here no undertaking to establish low preferential rates for the benefit of only a few large shippers whose units of sale and shipment would be greater than most others in the same trade.

That the 30,000 pound motor carrier minimum weight here would as a matter of physical operation require a small overflow to be loaded into a second truck vehicle is of no concern to shippers and should not be to the Commission. It does shippers no harm whether the freight be moved in one or in two trucks, and the Commission did not say otherwise. Freight haulage by motor carriers is a very flexible type of transportation. The remainder of the space in the second vehicle would be occupied by other freight of the same or a different kind of the same or different shippers. While there is no showing of lower operating expense per 100 pounds in transporting 30,000 than when transporting 20,000 pounds it is also true that there is no showing that the expense per 100 pounds would be greater for the larger than for the smaller quantity, yet the Commission did not deem the higher 47.5 per cent basis excessive. It is not questioned by the Commission that either 20,000 or 30,000 pound loads may be transported at less operating expense than small shipments to which the 70 per cent basis would apply. (*I. C. C.* v. *D. L. & W. R. Co.*, 220 U. S. 235, 240)

Nor could shippers complain when motor carriers govern their quantity rates by the same minimum weights as those which the railroads prescribe for carload shipments. They are not injured if motor carriers charge the same rates and minimum weights as do their competitors the railroads. They have no right to require motor carriers to charge the equal of railroad carload rates but for a lower shipping minimum than the railroads impose. Should there be any among the shippers who, now and then in individual instances, might prefer to ship less than 30,000 pounds at one time it would, under the condemned tariffs, be their

privilege to do so at a slightly higher rate per 100 pounds. That is a *benefit*, not a *disadvantage*. They are not injured by that privilege which the motor carriers would extend to them. On the other hand the maintenance of different rates per 100 pounds by railroad and trucking companies on the ordinary commercial sale and shipping weight of 30,000 pounds would necessarily cause a disproportionate share of those usual shipments to move by railroad. The Commission has simply misapplied to a different set of facts an old doctrine not in dispute.

The inaccurate thinking of the Commission as to "reasonableness", sanctioned by the court below, is evident from the following quotation from the final report of August 11, 1942.

> "If rates 45 per cent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload."

That language is not understandable in relation to the ultimate conclusion which the Commission reached. The actual ultimate conclusion was that the *47.5 per cent* basis would be not more reasonable for all shipments in quantity *whether they might weigh only 20,000 pounds or whether they should weigh 30,000 or more pounds. There was no prohibition against the actual use of part of the space in the second truck whenever the quantity tendered should exceed the legal capacity of any one truck.* It is competition—not difference in operating expense—which causes the need for both the 45 and 47.5 per cent bases. When, in the quoted language, the sentence began with an "if" and proceeded to say that if 45 per cent would be reasonable for shipments weighing 30,000 pounds then it, too, would be reasonable for shipments of 20,000 pounds, the assumption was a superfluous one. Supposedly, in the light of the ultimate conclusion, the important question was not whether 45 per cent or 47.5 per cent of first class would be

reasonable rates per 100 pounds. It was determined that either, viewed as rates per 100 pounds, would be reasonable. The ultimate conclusion of the Commission, *independently of the amount of the rate per 100 pounds, was that any motor carrier quantity minimum weight would be deemed by it unreasonable as a matter of "policy" when it may exceed the carrying capacity of single truck vehicles ordinarily used*, unless some lower operating expense be shown.

It is the validity of that determination which is here involved. The rightness or wrongness of that policy conclusion of the Commission does not depend on the amount of the rate per 100 pounds.

Nor would it depend upon the presence or absence of two quantity rates in accordance with the mere choice of the shipper what weight to ship. If, in the tariffs here involved, there had been only the 70 per cent basis of small weight shipments and the 45 per cent basis on 30,000 pound shipments the policy view of the Commission majority would have been the same. That is readily to be deduced both from the involved reports themselves and from the Commission's decisions in subsequent cases where only the one "quantity" rate was involved. (See *Re Cigarettes and Tobacco*, 42 M. C. C. 1; *Re Coffee from Jacksonville*, 34 M. C. C. 625.)

In neither of those cases was there in the motor carrier tariffs a choice as between a rate for 20,000 pounds and a lower one for a greater quantity than could be loaded into single truck vehicles. There were before the Commission in both cases only single "quantity" rates, corresponding in each instance to those of the railroads, and both involving shipment weights greater than single truck vehicles could carry. Yet in both cases the Commission condemned as unlawful the motor carrier "quantity" rates. In the *Cigarette* case it permitted the motor carriers to charge the equivalent of railroad carload rates but only for a minimum weight smaller than the one imposed by the railroads. In

the *Coffee* case it forced the motor carriers to charge more than the railroad carload rates (although the lower railroad rate could be afforded by the motor carriers) and to be governed by a minimum weight smaller than the railroads require. Therefore, it is clearly apparent that this "policy" of the Commission does not depend upon the presence of two motor carrier quantity rates like those here. That broad Commission "policy" seeks to condemn the widespread practice of motor carriers throughout much of the country of governing their quantity minimum weights by established trade units of shipment at the equivalent of railroad carload rates.

Therefore, it is submitted, the ultimate conclusion of unreasonableness of the 30,000 pound motor carrier minimum weight was in law arbitrary, unreasonable, and competitively destructive.

VI.

THE CONCLUSION OF DISCRIMINATION BETWEEN SHIPPERS HAS NO RATIONAL BASIS IN FACT OR IN LAW.

If there be no discrimination in *fact* there can be none in law. Yet each of the three rates sought by the motor carriers to be published *is available to any and all shippers.* Absolutely no restriction or restraint would be imposed upon the mere choice of the individual shipper whether to tender 30,000 pounds, 20,000 pounds or less. Shipments of 30,000 pounds or more are characteristic of the linoleum industry, easily within the reach of the manufacturers and traders in that commodity, as evidenced by the railroad 45 per cent basis which is limited in its availability to the 30,000 pound shippers.

There is no finding by the Commission that while in form an uncontrolled choice of rates (dependent merely upon shipping weights) is offered yet that because of economic considerations the choice is actually available only to a

few. In cryptic but scrupulous language the Commission avoided with evident purpose the saying of any such thing because nothing in the record would have supported it. What the Commission did say was that discrimination between shippers of 20,000 and 30,000 pounds would exist as between those "who tender" the one shipping weight or the other! That was artful and adroit language. It is capable of implying yet avoided a statement that there are two actual and different *classes* of shippers, i. e. some "large" ones who by the nature of their business ship the larger weights of 30,000 pounds and others who are "small" and who *therefore must* ship only the smaller weights. There was no finding, however, and none would have been warranted by the record, that such is the fact. The size of the shipper has nothing to do with the size of his individual shipments. On the contrary the record and the Commission's report itself (when the words used be carefully noted) establish that in ordinary linoleum trade economics the choice of shipping weights offered by the motor carriers is purely and freely optional. Neither the Commission's findings nor the record before it disclose any "classes" of shippers, some being "large" and others being "small" such as adroitly implied by the Commission and wrongly supposed by the court below. *Nothing would be granted to one shipper and denied to another.* Each would have an equal opportunity to avail the lower or the higher rate in accordance with his mere choice of individual shipping weight. The size of the shipper has nothing to do with the sizes of his individual shipments.

There is, therefore, a complete absence of any "discrimination" in fact. If a retail drug store offers to sell one tube of tooth paste for 20 cents or two for 35 cents would it be practicing "discrimination" among its customers irrespective of the rightness of its motive or economy in doing so?

The legal fallacy of the Commission's conclusion in respect to this issue of discrimination is abundantly demon-

strated by four decisions of the Supreme Court involving the same principle. Twice before the Supreme Court has set aside Commission orders in which the Commission had concluded that unlawful discrimination would exist in cases where the rate or regulation offered by the carriers was freely available to any individual shipper. (*Penn Refining Company* v. *Western N. Y. R. R. Co.*, 208 U. S. 208, 221; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42.) In each of these the Supreme Court declared that as a matter of law it is error for the Commission to suppose that an unlawful discrimination can exist when in fact there is no discrimination whatsoever in the mere offer of a conditional choice of rate or practice *freely* available to *any* shipper having an interest.

On the other hand, and rightly, in two other cases the Supreme Court has carefully distinguished instances of that sort and those in which both it and the Commission may consider that the apparent offer of a choice of rate or practice is merely nominal since only a few shippers of a particular class are capable of taking advantage of the more favorable terms. (*U. S.* v. *Chicago Heights Trucking Company*, 310 U. S. 344; *B. & O.* v. *U. S.*, 305 U. S. 507.)

The two lines of decision of the Supreme Court are wholly consistent but have not here been observed by the Commission or the court below. In the light of the stated facts and the carefully circumscribed findings of the Commission can it fairly be said that there is here no substantial question involved? Is it not rather the other way around: does not the Commission's conclusion of "discrimination" lack any rational basis in fact as well as in law?

In the *Mississippi Valley Barge Case*, 292 U. S. 282 neither the Supreme Court nor the Commission indicated any doubt concerning the legality of different transportation rates based upon different quantity shipments dependent upon the shipping weights tendered at any one time.

VII.

IN DISREGARDING COMPETITION BETWEEN MOTOR AND RAIL CARRIERS IN THIS CASE THE COMMISSION DID SO PURELY ARBITRARILY.

Government counsel, in their motion to affirm, agree that this Court has lately clarified very much the law of discrimination in transportation rates. Reference here is to the recent decision in *Barringer & Co.* v. *U. S.*, No. 520, October Term, 1942. If, contrary to the contention of appellants it were to be considered that there is a rational basis for the conclusion of some sort of actual discrimination among shippers, there would still remain the question of the sufficiency of the defense of "competition" likewise relied upon but which the Commission and the court below rejected.

The Government here concedes that the recent decision of the Supreme Court in the *Barringer Case* determined that differences between transportation rates may, because of competition, be determined lawful and not discriminatory, even in the absence of a difference in operating expense. That is to say even without a difference in operating expense the very purpose of meeting the rates and regulations of a competitor is to shrink the normal margin of profit in order to gain volume and thereby aid the enterprise as a whole.

Here the motor carriers candidly display to the Supreme Court this simple set of facts: on the very small shipments of linoleum they offer 70 per cent of first class as do the railroads; on any shipments weighing not less than 20,000 pounds (a single truckload) which might be tendered they offer 47.5 per cent of first class; and on the general trade unit of quantity shipments (30,000 pounds) they offer 45 per cent of first class as do the railroads. It is to compete with the railroads, on equal terms, that the lowest of these three rates, governed by the highest of the three minimum quantity shipments, were initiated in the involved tariffs,

regardless of the absence of any difference in operating expense. Because that competition for the larger but normal trade shipping units requires them to do so the motor carriers seek to go *below* their own separate rates for quantities not exceeding single truckloads. As no difference in operating expense was shown the fact in that respect must be taken to be that the motor carriers are shrinking their proper profits somewhat below the 47.5 per cent basis which the Commission found not unreasonable.

This entire competitive aspect of the matter was rejected by the Commission. But the language which it used convicts it of having done so in a purely arbitrary way and only for the purpose of serving its "policy" of excluding the trucking industry from participation in ordinary commercial trade units of shipment. This was its entire treatment of the subject:

First, it was said that a discrimination is not innocent, as a matter of law, because of the presence of competition, that such competition is a "factor" to be considered by the Commission, and that the presence of competition does not preclude a "finding" that the discrimination practiced is unjust. Those broad (and here undisputed) propositions were stated in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, which the Commission cited. Then the Commission goes on to say:

> "The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices."

As no party to the proceeding asserted to the contrary that mere generalization of statement by the Commission added nothing to the validity of its action. Merely to say that competition does not render lawful "unlimited" discriminations and prejudices settles nothing. It begs the whole question as to what are the duties of the Commission in respect to competition in a particular case since obviously, as in the *Barringer case*, and numerous others which preceded it, the Supreme Court has sanctioned the Commis-

sion's observance of competition as a lawful basis for the particular discriminations there involved.

But was it intended by the Supreme Court, in any of its decisions on this subject, to say that because the giving or not giving of important weight to the element of competition is an administrative function the Commission may act with respect to it in a purely arbitrary manner and assign no considerations whatsoever for its ultimate conclusion? Here, after indulging in the generalities above described, the Commission, in respect to this vital matter of competition, stated absolutely nothing in support of its rejection of the defense. It simply said:

> "The competition between rail and motor carriers for linoleum does not constitute such a dissimilarity in circumstance and conditions as to render legal the proposed discrimination."

Does this amount to anything more than to say in substance: "We have the authority to determine whether competition does or does not warrant a discrimination. As a matter of 'policy' we decide in this case not to recognize it"!

Did the Supreme Court, by any of its decisions, ever intend to invest the Interstate Commerce Commission with that kind of autocratic power? When it said that the recognition or non-recognition of competition is an administrative matter did not the Supreme Court mean that in arriving at its conclusions the Commission must set forth *some* persuasive considerations which would enable it to determine whether the Commission's action is purely arbitrary and hence beyond its authority? That administrative bodies, even when seeming to act within their authority, *must* make suitable findings on essential matters is one of the important ways of checking and guarding against action that is arbitrary.

The statute favors healthy competition between motor and rail carriers. Some strong statement of reason should accompany its disallowance. The Congressional policy

in terms forbids only "destructive" competition. (See the National Transportation Policy, enacted September 18, 1940, U. S. Code, Title 49, Sections 27, 301, and 901 Notes.) The Supreme Court accepted that construction of the statute in the *Scandrett Case*, 32 Fed. Supp. 995, affirmed 312 U. S. 661. In the *Barringer* decision the Supreme Court later sustained the validity of a discrimination by railroads based upon fair competition with motor carriers; does not the same statute recognize the right of motor carriers also fairly to compete with railroads? In the present Interstate Commerce Act, consisting of four parts, plus the "National Transportation Policy", there is clearly evidenced the purpose of Congress to preserve the right to engage in fair and reasonable rate competition but to forbid those competitive excesses which would be destructive of the general purpose of the statute to maintain a sound national transportation system. The very possession of the "minimum rate making power" as a safeguard against excesses is suggestive of the Congressional intent in that regard even before the "National Transportation Policy" was adopted. (*Mississippi Valley Barge Case*, 292 U. S. 282; *Milwaukee Coal Case*, 294 U. S. 299; *U. S. v. Ill. Cent. R. Co.*, 263 U. S. 515.)

Here the Commission found no forbidden excess of competitive effort by the motor carriers. It did not find threatened destructive injury to the railroads but on the contrary noted the withdrawal of railroad protest early in the hearing. It did not find any malicious purpose by the motor carriers. It did not find that the motor carriers had gone beyond what their competition with railroads required. It did not find that an undue burden on the other traffic of the motor carriers would be cast by this meeting of railroad competition on equal terms. It did not find that the legitimate competitive interests of the motor carriers would as well be served by different rates and minimum weights than those proposed. Having made no findings to any of those effects and having made no others to explain its rejection

of competition in this case the unwarranted invasion of managerial discretion finds no support in the statute.

In short, the real "policy" of the Commission, regarding motor carrier "quantity" rates, does not depend upon any question of discrimination. Neither the *Cigarette* nor *Coffee* cases before referred to involved an issue of discrimination. It was seized upon by the full Commission majority here (unlike Division 3) only as an afterthought and makeweight in the particular case.

In short, taken by the four corners, the Commission's majority report plainly reveals the arbitrary rejection of competition in the present case for no reason whatsoever except the supposed right to do so in order to serve a "policy" which nothing in the public interest appears to dictate.

VIII.

NO ISSUE OF EFFICIENCY OF OPERATION.

The court below, on its own responsibility, ventured the suggestion that the Commission's action in this case fits the notion of required "efficiency of operation" mentioned in U. S. Code, title 49, Sec. 316(i) and for that reason is sustainable. But the Commission did not put its decision upon any such ground and there is no seeming warrant for the court below to have done so. That is not the proper function of the judiciary. At the very most there was an isolated expression of doubt by the Commission whether, in respect to the partial use of a second truck vehicle on 30,000 pound shipments, would there "always" be available other freight to fill up the remainder of the space in that second vehicle. The language used was:

> "but it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available".

That was mere guesswork on the part of the Commission. The record before it was absolutely silent on such a subject.

The legitimate exercise of the Commission's authority may never rest upon mere expressions of "doubt" volunteered by the Commission out of its own general impression.

But it makes no difference. The Commission did not predicate its decision upon the exercise of any claimed authority to manipulate motor carrier rates to serve the Commission's own conception of what would or would not be efficient or economical. No issue of the sort was before the Commission. No decision on such a question was made. Whether authority existed to have made any such decision is not here involved. Whatever control, if any, might be possessed by the Commission over the efficiency of operation of transport companies its orders thereunder would have to be directed to a change of operation identified with reasonable certainty. Here the Commission did not disallow to motor carriers the privilege of physically transporting linoleum shipments weighing 30,000 pounds or more even though an overflow into a second vehicle would be required. It left motor carriers entirely free in that respect and therefore plainly was not exerting any claim of power over such a matter as the court below, of its own volition, volunteered in support of the Commission's order.

CONCLUSION.

The motion to affirm should be denied and the case should proceed in regular order.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1943
No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF IN BEHALF OF APPELLANTS

CHARLES E. COTTERILL,
Attorney for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1943

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIERS CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

No. 105

BRIEF IN BEHALF OF APPELLANTS

There is here involved the validity of an important motor carrier rate-making order of the Interstate Commerce Commission which was assailed by the main and intervening appellants in the United States District Court for the Southern District of New York (R. 1). That court (one Circuit and two District Judges participating) having dismissed the suit (R. 41) the case is here on direct appeal (R. 48). Probable jurisdiction has been noted by this court (R. 71), and at the same time it laid aside the Government's motion to affirm.

The involved Commission order was made by its Division 3 (R. 9). The full Commission membership reviewed it and by vote of seven to three left that order undisturbed (R. 21). The administrative remedy was thereby exhausted.

The opinion of the court below (R. 41) and its findings and conclusions (R. 39) were not directly responsive to the

particular contentions upon which appellants rely to invalidate the Commission's order. That court's opinion is mostly a mere restatement of the Commission's majority opinion to which was added emphasis upon the acknowledged fact that the Interstate Commerce Commission is an expert administrative tribunal. As the matter before this court is the validity of the Commission's own action the opinion of the court below will not here again be referred to.

I

FACTS

(a) Proceedings before the Commission.

Bearing effective dates which the record and the opinion describe the appellant Eastern-Central Motor Carriers Association (under powers of attorney in behalf and as the agent of its common carrier trucking membership) filed with the Interstate Commerce Commission tariff supplements in some respects changing the then-existing interstate motor carrier rates on linoleum floor covering from northeastern manufacturing localities to mid-western destinations. Before the effective dates thereof the Commission, by one of its divisions, entered upon an investigation of the lawfulness of the proposed changes in rates; and pending the conduct of that investigation the operation of the new tariff schedules was suspended. The final order of Division 3, after hearing, determined the suspended schedules would be unlawful in the limited and particular respect therein set forth, and their cancellation was required (R. 9). Thereafter the full Commission membership reopened the case for review of that order of its Division 3; but it did not do so before the effective date of the order which therefore had to be complied with under the duress of its terms. While writing a new opinion and changing somewhat the elements of decision the full Commission majority

left the order of Division 3 in effect (R. 21). Commencement of this action for judicial review then followed (R. 1). As the involved order, although complied with, is a continuing one the restraint which it imposes is here sought to be removed.

(b) Rates Involved.

In the suspended schedules so required by order to be cancelled the involved linoleum transportation charges were these: rates per 100 pounds at 45 per cent of first class would be charged when the quantity tendered to the motor carriers in one day for shipment on one bill of lading by one consignor to one consignee amounts to not less than 30,000 pounds. When the quantity so tendered might be less than 30,000 pounds but more than 20,000 pounds rates per 100 pounds at 47.5 per cent of first class would be charged. On the smaller weight shipments consisting of less than 20,000 pounds rates per 100 pounds at 70 per cent of first class would be charged (R. 21).*

(c) Findings of the Commission.

There is a paucity of true and clear "findings" in the sense of factual determinations. About all that can be gathered of that nature from the reports are these:

(a) The only protest against the new motor carrier rates came from a group of western railroads who, however, in the course of the public hearing withdrew their protest and retired from the case (R. 22). No shippers sought suspension of the operation of the new tariff schedules and none submitted evidence or took any part in the public hearing. When the full Commission reviewed the case it allowed a representative of linoleum manufacturers (not parties to

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* An accompanying tariff provision prevented the charging of more for a smaller weight shipment at the higher rate per 100 pounds than otherwise would be charged for a greater weight shipment at the lower rate per 100 pounds.

the proceeding) the privilege of participating in the oral argument. He "questioned the propriety" of the involved rates, contending they would be "unsound". He "requested" the action of Division 3 be affirmed (R. 27).

(b) The legal load-carrying capacity of the individual truck vehicles would enable about 22,000 pounds of linoleum floor covering to be transported in one vehicle. That is the consequence of state "trade barrier" laws. The full Commission said: "This maximum carrying capacity is the amount which can be carried under the laws of the state through which the trucks move" (R. 29). Therefore, as to shipments weighing 30,000 pounds, there would be an overflow of about 8,000 pounds into a second vehicle. The remainder of space in the second truck vehicle would, however, be available for the loading of other shipments of the same or a different kind of freight from the same or different consignors to the same or different consignees either at the same or different localities. The Commission added: "But it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available" (R. 29).

(c) The involved motor carriers did not offer evidence designed to establish that their operating costs per 100 pounds of linoleum floor covering would be lower on 30,000-pound shipments than on those weighing 20,000 or 22,000 pounds.

(d) The purpose of the motor carrier 45 per cent basis of rates, to be governed by a minimum weight of 30,000 pounds, was to make available to the shipping public (at its own choice) rates on quantity shipments by motor carriage as low as the railroad carload rates on linoleum, which were then also 45 per cent of first class and which were also governed by a minimum weight of 30,000 pounds (R. 30).

Appellants do not consider that any "findings" were made by the Commission other than those just enumerated.

if they are to be treated as findings at all. The record of the public hearing before the Commission is very short and has been brought up to this court as a part of the record before it in this proceeding (R. 49).

(d) Conclusions of the Commission.

By way of ultimate conclusion (wrongly described as a "finding") Division 3 determined that neither the suspended rates per 100 pounds of 45 and 47.5 per cent of first class would be unjust or unreasonable (because too low or too high) but that it would be unjust and unreasonable to attach to the availability of either one of them the condition that more than a minimum weight of 20,000 pounds would be required for each single shipment.(*)

The evident intent, and of course the practical effect of that order, would therefore confine the motor carriers to publication of a single "quantity rate", whether 45 or 47.5 per cent, which would have to be governed by the requirement of a minimum shipping weight of no more than may be loaded in a single truck vehicle, due to one or more state barrier laws along the routes of movement. A minimum weight to any extent greater than may be loaded in single truck vehicles "ordinarily used" was determined to be inherently unlawful even though 30,000 pounds is the accepted trade unit of quantity purchase and sale of these commodi-

(*) This was the language used: "We find that the proposed schedules in these proceedings are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable.

"The proposed schedules, to the extent found not just and reasonable, will be ordered canceled without prejudice to the establishment by respondents of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 per cent of the corresponding first-class rates". Page 13.

ties, even though it is the railroad minimum weight, and even though the overflow into a second truck vehicle would leave ample space for other shipments of other rate-paying shipments of the same or other kinds of freight.

In its decision on review the full Commission "affirmed" the prior "findings" of Division 3 as to the "unreasonableness" of so attaching the requirement of a minimum weight of 30,000 pounds to whatever might be the "quantity rate" offered by the motor carriers. But, unlike Division 3, the full Commission added by way of further conclusion (again wrongly called "finding") that the proposed 45 per cent rates, minimum 30,000 pounds, would give an unjust advantage to shippers who might "tender" 30,000 pound lots and be unjustly discriminatory against shippers who might "tender" 20,000 pound lots and who would therefore be subject to the 47.5 per cent basis of rates. The terms in which the full Commission couched those ultimate conclusions appear in the footnote.*

The clear object of both Division 3 and the full Commission majority therefore was to disallow to the motor carriers the right to attach to any of their quantity rates the requirement that the minimum weight of single shipments necessary to avail the lowest should be 30,000 pounds (requiring overflow into a second vehicle) and to compel the prescribed minimum weight not to exceed 20,000 pounds despite the trade unit of purchase and sale being 30,000. As there could not be two different levels of tariff rates between the same locality each based upon a minimum shipping weight

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* "Upon oral argument, we affirm the prior findings of division 3 that the proposed rates 45 and 47.5 per cent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 per cent of first class, are subject to a minimum of 30,000 pounds.

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots".

of 20,000 pounds the intent and result would necessarily be the required maintenance of only one rate level on quantity shipments, either at 45 or a somewhat higher percentage of first class, and to govern it only by the smaller 20,000-pound minimum shipping weight. That same result would come about under either the conclusion of "unreasonableness" or of "discrimination", were the order to be valid.

There would then be left to the motor carriers only the choice of making their 45 per cent rates available on a smaller minimum weight than the competitive railroad rates would require, or else to charge substantially more than the railroad rates per 100 pounds because of the smaller minimum weight to which the motor carrier rates would apply.

To exceed so considerably the railroad rates per 100 pounds would deny to motor carriers and the shipping public the privilege of competition that is fair. Yet for motor carriers to offer as low rates per 100 pounds as the railroads do, but to make them available on smaller-weight shipments than the railroad competition requires, would be to allow the competition only on terms and conditions not called for by the competition itself.

II

ASSIGNMENT OF ERRORS OF LAW COMMITTED BY THE COMMISSION AND THE COURT BELOW, AND SUMMARY OF ARGUMENT OF APPELLANTS.

The validity of this drastic action of the Commission (upheld by the court below) is assailed by appellant motor carriers on the following principal grounds embodied in the assignment of errors (R. 45):

1. The Commission's ultimate conclusions of illegality of the proposed rates are acknowledged in terms both by Division 3 and the full Commission majority to rest only

upon a Commission "policy". Other than the declared "policy" of the Commission in respect to these and other rates of similar kind no other reasons or "findings" were made by the Commission as a foundation for its conclusions. As the Commission possesses only authority to administer the provisions of the statute entrusted to it and it neither has been nor could be constitutionally endowed with legislative power to regulate motor carriers by a "policy" of its own creation, the order shows invalidity upon its face. (*Southern Pac. Co.* v. *I. C. C.*, 219 U. S. 433; *I. C. C.* v *U. P. R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.) One of the three dissenters (Commissioner Lee) properly spoke of the order as "arbitrary".

2. As both the 45 and 47.5 percentages of first class rate levels, dependent only upon the shipping weights tendered, would be openly and freely available under the tariffs to any shipper at any locality at his mere election of individual shipping weight, there would not and could not be in fact or in law any "discrimination" between shippers by the carrier offer of the choice. Nothing would be granted to some shippers and denied to others. Similar graded rates, dependent upon varying shipping weights, were before the Commission and this court and not deemed discriminatory in *Mississippi Valley Barge Case*, 292 U. S. 282. The Commission made no finding whatsoever that the lowest of the rates to be available under the tariffs only upon individual shipments of not less than 30,000 pounds would in practical economics be usable only by a restricted class or relatively few shippers or that there is lacking an equal opportunity of any shipper to take the choice of rates and shipping weights. On the contrary it is acknowledged by the Commission that shipments of 30,000 pounds of linoleum constitute the ordinary trade unit of quantity sales of these commodities as indicated by the fact that the railroad freight carload rates on the same commodities between the same localities are governed by a minimum weight of 30,000 pounds. In respect to the issue of discrimination the case is therefore

governed by *Penn Refining Co.* v. *N. Y. R. R. Co.*, 208 U. S. 208, 221 and *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42. It is distinguishable from *U. S.* v. *Chicago Heights*, 310 U. S. 344 and *B. & O.* v. *U. S.*, 305 U. S. 507.

3. The involved rates of 45 and 47.5 per cent per 100 pounds were determined not unreasonably low or unreasonably high. There was no determination that the carriers' earnings, on 30,000-pound shipments at 45 per cent of first class, would be too low or too high. No injury to any shipper was found to result should an overflow into a second truck vehicle occur on shipments of 30,000 pounds. No prohibitions against carrier acceptance of individual shipments weighing 30,000 pounds or even more was imposed. The ultimate conclusion that it would be "unreasonable" to govern any of the motor carrier rates by a required minimum shipping weight of 30,000 pounds was purely arbitrary and was arrived at only as a matter of "policy". No "multiple truck rates" are involved. The decision ignores completely the well-established 30,000 pound trade unit of purchase and sale. It rests upon nothing more than the Commission's assertion that (due to state laws) since about 22,000 pounds of this floor covering is all that may be physically loaded by the motor carriers in single motor truck vehicles "ordinarily used" it is *therefore* unlawful for motor carriers to impose a minimum weight requirement in excess (although small) of the legal load capacity of individual motor trucks so "ordinarily used", unless it should be shown that the carrier operating expense *per 100 pounds* is lower when the quantity shipped requires the partial use of a second vehicle than when only one vehicle is needed for the load. The Commission did not point to any salient facts or provision of the statute upon which that arbitrary conclusion of mere "policy" of its own is based.

4. As revealed by the Commission's reports the proposed rate level of 45 per cent of first class on quantity shipments of 30,000 pounds expressed the endeavor of

motor carriers to make available to shippers by highway the same rates per 100 pounds as the railroads at that time made on their carload shipments and which railroad carload rates are governed by the same requirement of 30,000 pounds as the minimum shipping weight.* The asserted right of motor carriers thus to effectuate a close competitive relationship between the motor and railroad rates was denied by the Commission on the extreme assumption that this court in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, allowed to it the authority to recognize or not to recognize competition virtually as it may please. No reason here was assigned or any facts found by the Commission why, unlike *Barringer & Co.* v. *U. S.*, No. 520 October Term 1942, the important element of competition between motor and rail carriers should have been so arbitrarily disregarded by the Commission. The Congressional policy favors fair competition in the public interest; it only prevents "destructive" competition.

5. There was no "finding" or "conclusion" of the Commission that inefficient or uneconomical motor carrier operation would result from the involved rates. At the most there was a loose expression of "doubt", not based upon anything contained in the record before it, that there would always be available sufficient less than truckload miscellaneous freight shipments to fill out the available space in a second truck vehicle from Boston to Dodge City or intermediate places. But the Commission must have lacked confidence in the significance of that "doubt" because it avoided any determination that the involved motor carrier rates, under either the minimum weight of 30,000 or 20,000 pounds, would produce earnings too low or too high in the way the business is ordinarily handled. Certainly the Commission's order is not, as such, directed to

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*After the new motor carrier tariffs were filed on the basis of 45 per cent for 30,000 pounds the railroads, for a while, established 42.5 per cent of 1st class.

any change of the carriers' operating practices, even if the statute would allow it, which is doubtful. The order does not forbid acceptance of shipments weighing 30,000 or even a greater number of pounds, regardless of the amount of truck equipment needed for their transportation. If to any extent whatsoever the Commission meant to hint at some remote chance of inefficiency and lack of economy its findings in that regard are altogether too nebulous to serve as a basis for a valid order.

6. The clear implications of the Commission's action in this and subsequent cases like it are that it is attempting virtually to *allocate* commodity freight traffic in this country as between motor and rail transportation so as to exclude motor carriers from participating in quantity freight shipments (within the usual limits of purchase and sale) except either (1) at higher than railroad rates per 100 pounds in consideration of the prescribed smaller minimum weight requirements or (2) to permit participation in such quantity shipments at the equal of railroad carload rates per 100 pounds only upon the condition of making them available to shippers at a lower minimum weight than the competitive railroad rates would call for. This endeavor of the Commission so to mould the competitive rate relationship of motor and rail carriers on quantity shipments of ordinary trade units of purchase and sale is wholly beyond its authority under the statute which forbids only "destructive" competition. The Commission was not given by Congress an unconstitutional power of arbitrary economic dictatorship over transportation. So long as the motor carrier rates are not otherwise unlawful the declared Congressional policy is to encourage freedom of competitive effort in transportation so that the shipping public may have the advantage. The Commission may not lawfully deny the privilege of fair competition; it may not allow the privilege of competition only under terms and conditions which would make it unfair and destructive.

III

ARGUMENT

A. The Commission's order is invalid because the conclusion of illegality was based only upon its own declared "policy".

It is here apparent that the Commission has not applied the statute. It has sought to apply only a policy of its own.

The preponderance of freight traffic in this country is transported by railroad. Trade and commerce have long become accustomed to the purchase and sale of goods in quantity units corresponding to the railroad definition of "carload". That definition is expressed in the form of a "carload minimum weight" which, as a rule, is not greater than railroads may transport in single cars and is generally less. With the more recent advent of motor truck carriage of freight the weight carrying capacity of individual motor truck vehicles has been largely influenced by the "trade barrier" laws of individual states which, for the present, remain in force under this court's decision in the case of *Barnwell v. S. C.*, 303 U. S. 177, Congress not yet having acted on the Commission's recommendation to make the matter one of federal law. These laws of particular states (especially east of the Rocky Mountains) so operate that the legal load carrying capacities of the ordinary motor truck vehicles are somewhat (although not now so very much) lower than the minimum weights prescribed by the railroads for shipments in their freight cars.

Motor common carriers and railroads are in position to compete with each other for much of the available freight traffic. Consequently, when effective Federal regulation under the Interstate Commerce Act began in 1936 it was not unnatural that motor carriers should to a very large extent incorporate into their tariffs not only rates for shipping weights that could be loaded into one vehicle but also rates to be applicable to those normal trade units of

quantity, purchase and sale which then moved and still move so largely by railroad under railroad carload rates and minimum weights even though the partial use of a second truck vehicle might often be necessary to accommodate legally the greater quantity. The availability of those motor carrier quantity rates has not been confined in any such way as to penalize shippers should the prescribed minimum weight exceed the legal carrying capacity of individual trucks. That an overflow into a second truck vehicle would often be required was deemed of no concern to shippers because their rate per 100 pounds for the prescribed minimum weight of individual shipments would not be affected and would generally be equal to or nearly equal to the carload rates of the railroads. That the per 100 pound-unit of operating expense of motor carriers would be no *lower* when the shipment called for an overflow than when it did not has been deemed immaterial if the respective rates and resulting earnings of the carriers be within the "zone of reasonableness." There was nothing sacrosanct in the legal weight carrying capacity of the individual truck vehicle so far as concerned the making of quantity rates. Nor could there be any rigidity in that respect because the "state barrier" laws are too variable. As an example, the legal load limit of single truck vehicles in the states of New York and New Jersey exceeds 50,000 pounds; in Pennsylvania the limit is only 25,000 pounds. Consequently the sizes of vehicles owned by the individual trucking companies depend largely upon the proportionate extent of their usual use in one or another of those states either locally or in interstate operations. To try to prescribe motor truck minimum weights on quantity shipments in accordance with these variable state laws would be virtually impossible as to interstate operations. The tariffs would be unreadable because of their complexity and anything resembling uniformity of treatment of shippers at different points of manufacture and markets would be impossible.

No "multiple truck" or "volume" rates, available to only a few, are therefore involved. The question is merely

the legality of a truck minimum weight corresponding to ordinary trade units of purchase and sale, but larger than may at times be legally placed in single vehicles "usually used."

In that broad economic situation the Interstate Commerce Commission, by majority vote, has nevertheless picked out one single fact as a predicate and built upon it a conclusion of illegality only because of its own determined and frankly declared "policy". Because the per 100 pound-unit of carrier operating expense may not be lower when an overflow into a second vehicle is required than when not so required the Commission, in this major test case, very candidly proclaims that as a matter of its own "policy" it will not allow motor carrier minimum weights to exceed the legal load limits of truck vehicles "ordinarily used" even though such minimum weights conform to established trade units of purchase and sale and correspond to those of the railroads.

This is the language used by the Commission's Division 3:

> "The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. *We adopt as a policy the condemnation as unreasonable* of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight." (Italics supplied.)

The full Commission membership, on review, declared that—

> "For the future *we shall follow the policy* announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers." (Italics supplied.)

Time need not here be taken to emphasize even the indefiniteness of this "policy". What may be meant by the phrases "usually used" and "customarily used" in describing its intent, it is at least perfectly clear that the Commission is here reaching out to fashion some sort of legal requirement of its own invention. While couching its ultimate conclusions of illegality in the broad terms of the statute the manifest endeavor of the Commission is to administer not any requirement of the law but only a "policy" of its own making.

As recently declared in substance by Mr. Justice Black, "Congress is the policy maker, not the Commission". Such has been the view of this court since the Commission was created. An order of the Commission was set aside for that reason in *Sou. Pac. R. Co.* v. *I. C. C.*, 219 U. S. 433. In two other cases this court upheld the Commission's orders against the argument that they merely expressed a Commission policy but only because this court concluded that the Commission's action was not of that kind. (*I. C. C.* v. *U. P. R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525.)

Here, unlike those other cases, there is no need to search for the real meaning of the Commission's decision. In plain and somewhat bold disregard of this court's attitude on the subject the Commission here, in terms, announced that its conclusion of illegality was arrived at as a matter of "policy" of its own.

That would seem sufficient, even if nothing else appeared to condemn the order as beyond constitutional and statutory authority. Certainly the Commission's frankness of

expression compels the surmise that whatever else it may have said, if anything, to support its formal conclusion, would be only a contributing makeweight.

B. There would be no discrimination in fact or in law as concluded by the Commission.

As if to support its determination of "policy" the full Commission declared the conclusion that there would result "discrimination" between shippers at the same locality under the involved motor carrier rates. The only fact pointed to by it pertinent to that question is that the carrier operating expense per 100 pounds would not be different whether the individual shipping weight should be only enough to load in one truck (20,000 pounds) or a greater load of 30,000 pounds requiring an overflow. Division 3 did not so hold. This was the language used by the full Commission majority in stating its conclusion on this feature of the case: that the involved rates "would give an unjust advantage to shippers of 30,000 pound lots and be unjustly discriminatory to shippers of 20,000 pound lots."

Appellants respectfully urge before this court, as in the court below, that there would be no discrimination in fact and hence there could not be any in law.

The condemned tariffs would be freely open to all. Nothing would be granted to some and denied to others. Any shipper between the involved localities could choose for itself whether to sell or buy and ship at one time 20,000 pounds of linoleum at the 47.5 per cent rate or to sell or buy and ship at one time 30,000 pounds at the 45 per cent rate. The choice could be a continuing one or vary from day to day or even as between different shipments during the same day.

The report of the full Commission majority can be searched in vain for any finding of fact upon which properly to conclude that there would thereby be accorded to any shipper or class of shippers more favorable treatment by the motor carriers than would be accorded any other ship-

per or class of shippers. There is a complete absence of any suggestion, by way of finding or even inference; in the Commission's report, that the availability of the slightly lower 45 per cent basis for 30,000 pound shipments, although openly published for all, would in practical trade economics be confined to a limited few or to those of a particular class. No such finding could have been made since 30,000 pound shipments of linoleum are the normal units of quantity purchase and sale as revealed by the railroad carload rates which apply between the same localities only on shipments of 30,000 pounds.

The case therefore is readily distinguishable from *U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 and *B. & O.* v. *U. S.* 305 U. S. 507. It is more like the cases of *Penn. Ref. Co.* v. *Western New York & P. R. Co.*, 208 U. S. 208, 221 and *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42.

Appellants here do not question that the mere openness of tariff publication of a shipper choice of practice, with resulting difference of rate may, under some circumstances, nevertheless work out as a forbidden discrimination under the statute. As in *Chicago Heights Trucking Co.* case and *B. & O. Warehouse* case above mentioned it is entirely possible that only a restricted number or class of shippers are in practical economic position to avail a seeming unrestricted choice of practice with resulting difference in rate. That would be a harmful actual discrimination.

But here there is no finding or even inference by the Commission that any such situation would exist. Consequently the present case would seem to be governed by the *Penn Refining* and *Diffenbaugh* decisions of this court. In both of those this court set aside Commission orders in which the conclusion of shipper discrimination was asserted. In both this court concluded otherwise as a matter of law for the reason that in each it appeared that any and all shippers had an equal opportunity, both in form and business economics, to avail either the lower or higher rate as a mere matter of choice dependent upon the chosen shipping practice.

Thus in the *Penn Refining Co.* case the railroad carriers published a single level of rates on petroleum products. If shipments were made thereunder in barrels or other package containers the railroad tariffs provided that the weight of the containers should be charged for along with the weight of the contents. If, however, the shipments were to be made in tank cars the transportation charges would be assessed only upon the net liquid weight. The Commission concluded that the difference in practice caused unjust discrimination between shippers. This court set the Commission's order aside as a matter of law. From the Commission's findings in that case it appeared to this court that the particular reason why the complaining shipper did not elect to ship in tank cars was the fact that it did not possess facilities of its own by means of which to load the oil into tank cars. This court therefore concluded that in such a situation there was merely a voluntary disadvantage to which the shipper had subjected himself. There was no refusal by the railroads to furnish tank cars had they been requested. The language of this court was:

> "Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one) while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand".

In the *Diffenbaugh* case the essential facts were that the railroads in their tariffs authorized an allowance to be paid by them for the elevation of grain. The factual finding of the Commission was that when any shipper of grain happened to be the owner of a grain elevator the payment to it of that tariff allowance for elevation operated as a discrimination in favor of that shipper against other shippers not owning and operating elevators. This court set aside

the Commission's order which had forbidden the continuance of the tariff. In its opinion this court said:

> " . . . the ground of the decision (of the Commission) is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain.
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> • • •
>
> "We agree with the court below that this decision is erroneous in its conception of the grounds on which, under the statute, an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in Penn Ref. Co. *v.* Western New York & P. R. Co. 208 U. S. 208, 221, 52 L. ed. 456, 462, 28 Sup. Ct. Rep. 268. The law does not attempt to equalize fortune, opportunities, or abilities."

Those two decisions are believed applicable here.

A retail drug store may have a legitimate business motive (other than a mere difference in operating expense) in offering to the public one tube of tooth paste for 25c, and two tubes for 40c. Whether the motive be a sound one, and whether or not there be a difference in operating and sales expense, it could hardly be said that such an offer of the druggist would amount to a "discrimination" between his customers. The purchase of the two tubes of tooth paste being readily within the means of nearly all of those who might frequent his store his unrestricted offer could not in the nature of things operate as a discrimination in fact.

Here in the present case, the Commission has erred in believing otherwise. It appears to have considered that if the carrier operating expense *per 100 pounds* should not be different whether 20,000 (a single truckload) or 30,000 pounds (requiring an overflow) be shipped then that the unrestricted carrier offer of a choice of rates dependent upon the quantity shipped would constitute some kind of "discrimination" between shippers. But that is a clear

mixture of thought. It appears to assume that the statutory test of a forbidden "discrimination between shippers" turns upon whether a difference in rates is warranted by a difference in carrier expense. But if in fact any shipper is freely entitled to make the choice and there is no discrimination in fact as between them neither the carriers' operating expense nor any other business motive (right or wrong) is material to the issue of whether there is discrimination under the statute.

If there would exist in the involved tariffs any discrimination in *fact* then the question of carrier operating expense per 100 pounds would arise as a circumstance to be considered in determining whether the discrimination would be justified or not. But where, as here, there would be no discrimination in fact in the sense of denying to some what would be granted to others the absence of a difference in operating expense could not create a *discrimination*, in violation of the statute, which otherwise would not exist.

How seemingly confused the thinking of the Commission was in respect to this matter is evident from the following quotation taken from the majority opinion. It is the only part which speaks of discrimination at all:

> "Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload. In

> the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.
>
> * * * *
>
> "We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots."

The Commission's reference there to different "classes of shippers" will be observed. That use of language, standing alone, would suggest that elsewhere in the opinion there may have been a finding that there are two classes of shippers, i. e., those whose business enable shipments of 30,000 pounds and an entirely different group who are compelled, for some inherent economic reason, to ship only 20,000 pounds at a time. But no such other finding was made nor could have been made on the record. In speaking of "classes of shippers" the language employed goes on to define the Commission's meaning as "those who tender" the one shipping weight or the other "at one time"! There is not here attributed to the Commission intentional adroitness designed to mislead. But when analyzed the quoted language, stripped of superfluous verbiage, amounts to nothing more than the palpable error of saying that a "discrimination between shippers" can exist although each and every one is freely and economically entitled to choose what weight to ship "at one time" and thereby obtain either the lower or the higher rate as may be desired, dependent only upon the quantity which each is at full liberty to "tender".

It is therefore respectfully submitted that as a matter of law the Commission's conclusion with respect to the question of discrimination was erroneous.

C. The conclusion of "unreasonableness" was legally arbitrary because it did not rationally follow from any factual finding made.

It was determined by the Commission that the 47.5 per cent rate basis applicable to individual shipments weighing between 20,000 and 30,000 pounds would not be unreasonably high nor produce excessive earnings to the carriers. It was also determined by the Commission that the 45 per cent basis applicable to individual shipments weighing 30,000 pounds or more would not be unreasonably low nor unreasonably high or cause the resulting earnings of the motor carriers therefrom to be either too low or two high. Both rates with their respective minimum weights were, apparently, deemed to lie comfortably within the "zone of reasonableness". (See *Milwaukee Coal Case*, 294 U. S. 299; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Keogh* v. *C. & N. W. R. Co.*, 260 U. S. 156; *Skinner & Eddy* v. *U. S.*, 249 U. S. 557; *American Express* v. *Caldwell*, 244 U. S. 61.)

There was no determination that the 45 per cent basis, applicable to shipments of 30,000 pounds, would consist of "multiple truck" rates in the sense that the availability of those rates would in practical effect be confined to only a few or a particular class of shippers. There was no question that 30,000 pound shipments of linoleum would be comfortably within the established trade units of purchase, sale and shipment of that commodity, the standard railroad minimum weight on the same commodity being 30,000 pounds. There was no determination that any penalty in the way of rates or service would be imposed upon shippers who may choose to avail themselves of the 45 per cent rates even though because of particular state barrier laws it would often be required that the motor carriers, to accomodate shipments of 30,000 pounds, would put an overflow of a few thousand pounds into a second truck vehicle. It was not questioned by the Commission that normally the remainder of the available space in the second truck vehicles

would be utilized by the motor carriers for the transportation of other shipments of the same or a different kind.

Nevertheless the Commission majority concluded, as a matter of "policy" of its own, that it would condemn as "unreasonable" any minimum weight for motor carriage shipment calling for a quantity which would to any extent exceed the legal load carrying capacity of single motor truck vehicles "usually used", unless it should appear (as it here did not) that the unit operating expense of the motor carriers per 100 pounds would be lower for the larger shipments calling for the overflow.

That conclusion of "policy", in the belief of appellants, was in law arbitrary. It was so described by one of the three Commission dissenters. As the 45 per cent basis of rates, for shipments of 30,000 pounds, was not determined to produce charges or earnings which in themselves would be unjustly and unreasonably high or low there was an inherent contradiction in the conclusion that nevertheless the required individual shipping weight of 30,000 pounds would in itself be unreasonable merely because that quantity may not legally be placed in a single vehicle.

There is no rational relation between the weight that may be legally loaded in one truck and the justness and reasonableness of a prescribed minimum shipping weight which shall govern the application of a particular rate per 100 pounds. It is of no concern to shippers, and ought not to be to the Commission, whether the required minimum shipping weight can be put legally into one truck vehicle or would require the partial use of a second one. The reasonableness of a prescribed weight, standing alone, should not be tested by its relation to the mere physical legal load limit of a single truck vehicle if nothing else points to the unreasonableness of the minimum weight requirement itself.

The case would be wholly different if the required minimum of 30,000 pounds was not, in practical economics, readily available to all. It would be different if the carrier

earnings, for shipments of 30,000 pounds at 45 per cent, were unreasonably low or unreasonably high. It might even be different if the 47.5 per cent basis, offered for use by those shippers wishing to tender only 20,000 pounds, were deemed unreasonably high or would produce unreasonably high earnings. None of those conditions here exist.

Both the 45 per cent and the 47.5 per cent basis, with their respective minimum weights, evidently are regarded by the Commission as within the "zone of reasonableness" as far as earnings are concerned. If the prescription of a minimum weight of 30,000 pounds be thought of as a "practice affecting rates" and its reasonableness be tested independently of carrier earnings the inquiry would have to concern other things and call for other findings than those here made by the Commission. Had the Commission laid aside any aspect of the case other than the reasonableness of the "practice" of making available the 45 per cent rates only upon condition that 30,000 pounds be shipped at one time the reasonableness of the "practice" would depend upon such matters as the general convenience of the shipping public in view of its established trade customs and whether or not any rate penalty would be imposed upon shippers if the required minimum weight exceeded the legal load carrying capacity of single vehicles. But the Commission made no determinations adverse to the practice on those grounds and could not have on the record before it. Instead it concluded, in substance, that if reasonably a carrier can "afford" the lower of two rates within a zone of reasonableness, although made for competitive reasons, it should remove the condition attached to its availability and elect to charge either something higher without the condition or to charge the lower rate without the condition.

The foregoing technical analysis, although correct, tends to obscure what was the real thinking of the Commission. Actually, it put its decision of "policy" on a broader and more candidly stated basis. It pointed to the fact that in the history of its regulation of railroads it

long had felt that quantity rates for shipment by railroad should not be governed by minimum weights greater than the ordinary commercial units of purchase and sale such as a single carload. (*Providence Coal Co.* v. *P. & W. R. Co.*, 1 I. C. R. (not I. C. C.) 163; *Thurber Case*, 2 I. C. C. 742; *Anaconda Copper Mining Co.* v. *C. & E. R. Co.*, 19 I. C. C. 592; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458; *Re Molasses Case*, 235 I. C. C. 485; *D. L. & W. R. Co.* v. *U. S.*, 220 U. S. 235). For no apparent reason in law or compelling economics the Commission here has therefore resolved merely as a matter of policy of its own similarly to confine motor carriers to the making of their quantity rates which, in respect to their prescribed minimum weights, would be available to any shipments capable of being loaded into single truck vehicles "usually used". It does not say just why that would be the only lawful course in the case of trucks. Its purpose apparently is merely to transplant to the motor carrier industry a broad rule of action heretofore applied to railroads *despite the utter lack of any comparable reason for doing so.* When denial of the privilege of making railroad carload rates dependent upon shipping quantities greater than single carloads was developed by the Commission over the years the typical and leading Commission decisions above cited show the reason for it. That reason simply was that, with evident rationality, the Commission considered that it would be unreasonable and preferential for railroads to offer quantity rates greater than the customary units of commercial transaction would call for, they being usually a single railroad carload. Otherwise only a few or a restricted class of shippers would be in position to avail the quantity rates. It is for that reason that "train load" rates in general have been forbidden because they involved "multiple car" shipments.

Here, however, while speaking of the 45 per cent motor carrier rates as if in the nature of "volume rates" because to some extent exceeding single truck loads the Commis-

sion has ignored completely the fact that the minimum weight of 30,000 pounds is comfortably within the range of ordinary commercial unit of sale and shipment and would call for an overflow of only a few thousand pounds. Because the carrying capacity of railroad freight cars and the legal carrying capacity of motor trucks are not the same the Commission now seeks, as a matter of policy of its own, to apply to motor carriers (without a similar reason for doing so) an arbitrary rule that the truck minimum weights shall not exceed the legal carrying capacities of individual trucks "customarily used".

In that respect its position is not confined to cases in which, as here, the motor carriers may offer a choice of two quantity rates, i. e., the one to be governed by a minimum corresponding to single truck loads, and the other, slightly lower, calling for an overflow. In its subsequent interpretations of the meaning of its decision in the present case it considers the same rule applicable even though only one quantity rate shall be provided (See as typical *Cigarette and Tobacco*, 42 M. C. C. 1; *Re Coffee from Jacksonville*, 34 M. C. C. 625).

It is therefore respectfully urged that this court invalidate the order of the Commission in respect to the conclusion of unreasonableness on the ground that it is legally arbitrary, that it is inherently contradictory, and that the conclusion of unreasonableness of the minimum weight of 30,000 pounds does not rationally follow from any facts determined and declared by the Commission.

D. In rejecting the defense of competition between motor and rail carriers the Commission made no findings whatsoever and acknowledged arbitrariness.

Beneath the whole situation of fact which this case presents it is the predominating element of competition between motor and rail carriers. It plainly appears in the

record before the Commission and is accepted by the Commission itself that here the motor carriers seek to establish two quantity rates each of which would be within the zone of reasonableness. Those spoken of as 47.5 per cent of first class would be applicable to individual shipments that may be tendered in quantities of not less than 20,000 pounds (enough to fill one truck) or more than 20,000 pounds up to but not including 30,000 pounds (calling for an overflow). Those rates and the prescribed *minimum* weight were determined by the Commission to be just and reasonable in all respects even though applicable to shipments weighing considerably more than 20,000 pounds and more than could be legally loaded into a single truck. In addition the motor carriers, in order to compete fairly with the railroads, seek to establish slightly lower rates based upon 45 per cent of first class and to condition them upon the requirement that the *minimum* shipping weight shall be 30,000 pounds. Those rates, too, were determined by the Commission not to be unjustly or unreasonably low or high and there was no conclusion that such rates, in association with the 30,000 pound minimum, would produce carrier earnings too low or too high.

That the carrier operating expense per unit of 100 pounds was not shown to be different is believed by the motor carriers to be immaterial (in the absence of an actual discrimination between shippers) for the reason that the lower rate and higher minimum weight involved a voluntarily lowering of profits in order to compete with the railroad car load rates. That the carrier operating expense would be substantially lower under either the 30,000 or 20,000 pound minimum than on smaller shipments weighing less than 20,000 pounds (on which 70 percent of first class would be charged) was not questioned by the Commission. As both the 45 and 47.5 percent rates per 100 pounds would lie within the zone of reasonableness even if there were to be an actual discrimination between shippers (contrary to the fact) the asserted right thus to meet railroad competi-

tion at the 45 percent rates is believed to have been fully sustained by the recent decision of this court in *Barringer* v. *U. S.*, No. 520, October Term, 1942, regardless of the relative expense of handling the two shipping weights. Carrier expense had nothing to do with the decision of this court in that case.

Appellants did not take before the Commission or the court below such a position as that the mere fact of competition invariably and under all conceivable circumstances is a defense, under the prevailing Interstate Commerce Act, where the legality of rates may be in question. But it has heretofore been understood to be the law that before competition may be *rejected* as a defense there must be ascertained and declared essential facts taking the case out of the general rule that competition is favored by the statute and is ordinarily a complete defense.

Here the Commission, in rejecting the defense of competition, did so for no stated reason whatsoever and without any finding of fact upon which this court itself could be disposed to sustain the Commission's action. Instead the Commission put itself squarely upon the proposition (erroneously of course) that the decision of this court in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, allows to it the right to accept or reject competition at will. Seemingly the thought is that recognition or rejection of competition by the Commission is something which lies with it solely as a matter of its own "policy". This is the language, and all the language, it used in respect to this very important feature of the litigation:

> "The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and

prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such dissimilarity in circumstances and conditions as to render legal the proposed discrimination."

It will be noted from this quotation that the Commission gives no reason whatsoever why, in the particular case, the defense of competition was rejected. It simply states that this court's decision in the *Illinois Central* case makes the matter of competition only a fact to be considered by it, that competition does not relieve regulated carriers from the duty of according reasonable rates, or render lawful "unlimited" discriminations and prejudices as a matter of right. If it be granted that those generalities do not too greatly depart from an accurate statement of the law their mere statement however left undisposed of the question whether in this particular case should competition be recognized or not, and if not then why not. But as to that decisive question nothing more was said by the Commission than that "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstance and conditions as to render legal the proposed discrimination." Absolutely no reason whatsoever is given for that determination of the Commission. It betrays the sheerest of arbitrary action not sustainable by any expression ever uttered by this court.

Before 1920, when the Commission first acquired the power to alleviate the stresses of excessive competition through the prescription of minimum rates, this court had frequently dealt with competition as a defense to claims of illegality of rates:

I. C. C. v. *B. & O. R. Co.*, 145 U. S. 263;
C., N. O. & T. P. Ry. Co. v. *I. C. C.*, 162 U. S. 184;
T. P. R. Co. v. *I. C. C.*, 162 U. S. 197;
L. & N. R. Co. v. *Behlmer*, 175 U. S. 648;
E. T., V. & G. R. Co. v. *I. C. C.*, 181 U. S. 1;
Intermountain Rate Case, 234 U. S. 476.

While then leaving to the Commission a modicum of administrative authority in respect to the matter, *under exceptional conditions*, those decisions reveal that this court then considered competition a very significant and as a rule dominating fact under the statute.

It was in 1920 that Congress reversed the former policy of regulating carriers in merely a restrictive manner. In that year it greatly amended the Interstate Commerce Act to the end of promoting the welfare of transportation agencies themselves. It was said by this court in the decision in *Dayton* v. *Goose Creek Ry. Co.*, 263 U. S. 456, that the amended statute of 1920 "marked a new departure". It moderated the effect of the anti-trust laws upon consolidations and pooling; a rule of rate making was prescribed based upon the general average of operating results in wide rate-making territories; it enlarged the Commission control of divisions of joint through rates so as to strengthen the weaker lines; and it restrained the excesses of competitive strife among carriers by allowing to the Commission authority to prescribe minimum rates.

In time (1935) motor carriers were brought under regulation in Part II of the Act; after that domestic water carriers were embraced in Part III of the Act (1940); and still later freight forwarders were brought in by Part IV.

For the purpose of adjusting the competitive relations between these different agencies of transportation Congress in 1940 adopted an over-all transportation policy which by its terms was made a rule of action in construing all parts of the enlarged statute (U. S. Code Title 49, Secs. 27, 301, and 901 Notes, 54 Stat. L. 899). In its entirety that declared "National Transportation Policy" sought to effectuate a healthy balance between the adequate protection of shipper interests and at the same time the upbuilding of a sound domestic transportation industry in this country. It was in terms declared among other things to be the policy of Congress to provide for "impartial regulation of all modes of transportation to be so administered as to recognize and preserve the inherent advantages of each".* In respect to the establishment and maintenance of reasonable charges, without unjust discriminations and preferences, it was declared to be one of the objects of the statute to prevent "unfair or destructive competitive practices".

Congress did not thereby say that the statute was designed to prevent competition at all or that competition would not be a weighty consideration in the administration of the entire Act. It intentionally allowed a free play to the forces of fair and constructive competition; it denounced only "unfair or destructive competitive practices".

This court's recent decision in the *Barringer* case confirms in all respects that broad conception of the meaning of the statute in relation to the legal effects of competition. There an order of the Commission was sustained which had upheld the validity of an actual discrimination practiced by railroads for the reason that the discrimination rested upon the ascertained element of competition between the railroads and motor carriers. No findings had there been made by the Commission which seemed sufficient to warrant the setting of that order aside on the ground that competi-

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* No question of "inherent advantages" was dealt with by the Commission in this case.

tion had been improperly recognized as a defense. Nothing "destructive" in the way of competitive excess was there determined to exist, and for that reason the discrimination was allowed to stand.

The language of the "National Transportation Policy" concerning the degree of legal importance to be attached to competition was itself derived from this court's own prior decisions in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Mississippi Valley Barge Case*, 292 U. S. 282; and *Milwaukee Coal Case*, 294, U. S. 299. *Scandrett* v. *U. S.*, 312 U. S. 661, affirming per curiam 32 Fed. Supp. 995. Out of this court's decisions in those cases there is to be gathered this understanding of the previously existing law applicable to this subject: competition is a dominating defense circumstance unless it be excessive in the production of unduly low rates below service costs, unless the competitive rates would "menace the integrity" of transportation as a whole, unless it be malicious and designed to destroy competitors, or unless it should produce discrimination between shippers or localities that would otherwise be undue in their extent and harmful in their consequences. As successively motor carriers and water carriers, and then freight forwarders came within the scope of the statute Congress determined to make applicable to them too and to their competitive relations with each other and with railroads the same broad conceptions as to the legal effects of competition by boiling all of it down to the simple expression contained in the 1940 "National Transportation Policy". Having therein declared that the Congressional intent is directed to the avoidance of "unfair or destructive competitive practices", there was left ample room for the free play of competitive forces that may not be determined "unfair or destructive".

Sound considerations of public policy would quite naturally lead to that sort of comprehensive line of demarcation. It serves best the interests of both shippers and carriers and hence of the nation itself. In the nature of things it would be the Congressional intent to promote, not to discourage, competition that is fair and not destructive.

But wherein can room be found in these conceptions of the statute for the Commission's asserted power in this case. In here rejecting the defense of competition it made no findings of malicious or excessive competitive zeal, menacing effect upon competitors, unfair and destructive competition, or hurtful discriminations of an actual kind greater than the competition itself would warrant. Instead the Commission contented itself with the extreme assumption that it possesses the right to reject or recognize the defense of competition with no statement of reason therefor as if the arbitrary power to do so was intended by this court to be upheld in *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515. The right to pursue its own "policy" is all that seems to be claimed.

That is not and could not be the law. There is no place in our constitutional scheme of government for the possession of arbitrary power of that kind by any administrative agency of government.

Clearly, as stated, Congress favors, in accordance with its own declared national transportation policy, competition of a healthy sort; it discourages destructive and unfair competition. It undoubtedly allows to the Interstate Commerce Commission a wide field of administrative action in determining and setting forth, as a body of experts, which side of the line a particular situation falls and why. It did not, however, accord that administrative agency the right to do as it may merely please because of a "policy" of its own and to give no explanation whatsoever for its conclusion on the defense of competition in a particular case.

For that reason the order here involved should be annulled and set aside.

E. The Commission made no findings concerning efficiency of operation and no question of the sort was involved.

Little need be said here concerning this topic. In its report the Commission majority alluded to Sec. 216 (i) of the Interstate Commerce Act (U. S. Code Title 49, Sec. 316 (i)) which among other things speaks of the "need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service." Following that quotation the Commission calculated the gross truck-mile earnings under the involved rates in accordance with various assumed different loadings of linoleum. Among them was one in which it was observed that if only 8,000 pounds were put into a second vehicle and no other freight were to be loaded into it the truck mile earnings on that 8,000 pounds would be only 6.9 cents. Then this was said:

> "In both of the examples given the carrier would have space available in the second truck in which less than truckload shipments could be transported, but it is doubtful whether less than truckload shipments from Boston to Dodge City or between intermediate points always would be available".

It is not at all certain that Section 216 (i) of the Interstate Commerce Act, when speaking of reasonable truck rates being those which would enable "adequate and efficient transportation at the lowest cost consistent with the furnishing of such service", has any reference at all to particular rates. It would seem to relate only to the rate structure as a whole having in mind that the paramount object was the assurance of "adequate and efficient transportation service in the public interest". While the Commission is admonished by the statute to keep motor carrier rates as a whole at the lowest level consistent with the accomplishment of that national policy it is difficult to find wherein

there would have been any room or occasion for its application in this particular case as the basis for an order. It is only "rates" that are spoken of. If, to meet competition, and thereby aid themselves, the motor carriers depress somewhat certain of their rate levels on quantity freight shipments without impairing the adequacy and efficiency of their general operations, and in that sense they could "afford" to do so, it would not seem that to attach to the availability of such competitive rates the requirement of a minimum shipping weight calling for an overflow into a second vehicle could be deemed unlawful under the quoted language of Section 216. Because the operating expense per 100 pounds may not be less when an overflow is required than when it is not would hardly give to the Commission the power to compel the lowest of the competitive rates to be made available on shipments of the smaller weight only because it could be "afforded". Within the zone of reasonableness the carriers should be left free to make higher and more normally profitable rates for the accommodation of those smaller weight shipments of between 20,000 and 30,000 pounds which, if not exceeding 22,000 pounds, could be placed in a single vehicle. To require motor carriers to drag all their normal rates to the level of lower ones which competition requires would only defeat instead of serve the Congressional purpose concerning adequate, sound, and efficient transportation.

But a more cogent consideration is that the Commission made no "findings" appropriate to an involved subject of this kind. There was no determination by it that inefficiency of operation would lie in what the motor carriers here seek to do. Nor was there anything resembling a categorical determination that the 45 per cent competitive rate basis on quantity shipments should be made available on any shipments weighing 20,000 pounds *or more* because to do so would produce the lowest transportation cost consistent with adequate and efficient transportation. Had the intention of the Commission been to put its decision upon a

ground of that sort much more would have been said and would have had to be said to support a valid order, even if one could have been made on any such theory of the law. A construction of the statute allowing the Commission a sweeping power of that sort would enable it to reach down into so much of the details of business management of the carriers as to make them virtually incapable of private operation. That construction would not, therefore, be warranted even if the question should at any future time come before this court.

On the record before it the Commission had no basis for an assumption that the overflow quantities into second vehicles would not ordinarily be mixed with other freight shipments which would pay their own separate and additional rates; nor did it do so. For it to express, therefore, as it did, "doubt" that that always would be so was not something which the record itself dealt with and at the most was a surmise which, even if true, would represent only the extreme and not the ordinary experience in motor carriage.

F. The Commission here sought to put the motor carriers into a straight jacket and to accomplish unlawfully by indirection an allocation of traffic.

It is not here complained that state regulatory laws, sometimes punitive, limit the sizes of motor truck vehicles and their legal loadings on the public highways. That appropriate limitations upon the sizes of motor trucks are required for the public safety and convenience, whether to be imposed by state or Federal authorities, is not here a matter in issue. This case concerns only the reasonableness of certain motor carrier freight rates and the minimum shipping weights which shall govern their application to particular transactions. Whether small or large individual shipments were to be made has nothing to do with enlarge-

ment of the legal load carrying limits of individual truck vehicles. All that the motor carriers here seek to do is, while maintaining quantity rates not unreasonably high in themselves to be governed by minimum shipping weights of 20,000 pounds, to offer at the same time slightly lower rates like those of the railroads on minimum shipping weights of 30,000 pounds, both to be within the zone of reasonableness, even though the larger quantity may require an overflow because of legal load limits of single vehicles.

This the Commission seeks to prevent. It wrongly supposes that the controlling test of legality is only the matter of carrier operating expense per 100-pound units. It seeks to make "cost of service" the dominant and all-controlling circumstance. It would ignore entirely, because of its own policy, the free play of fair competition. It seeks to fashion motor carrier and railroad rate structures in their relation to each other only on the basis of their respective unit operating costs, with consequent allocation of traffic to the respective forms of transportation in accordance with what the cost calculations might show.

The statute does not have that effect or endow the Commission with any such authority. This court in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, said:

> "While in the making of reasonable rates all the material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The act does not require any such determination."

The *Milwaukee Coal* case, supra, could not have been decided as it was if the relationship of rates on competitive traffic as between different carriers had to be measured exclusively by their comparative service costs on particular movements of freight. The *Mississippi Valley Barge* case,

supra, would not likely have been decided in the way it was had the railroads there involved been prevented by law from reducing somewhat on the heavier shipments their normal rates within reasonable and honestly competitive limits because of their desire to participate with the Mississippi River barge lines in available competitive traffic. The recent decision in the *Barringer* case turned on competition, not comparative service costs.

Congress would not likely have intended otherwise. In forbidding "unfair and competitive practices" it did not mean to deny the privilege of competition in rates at all. It did not say that only relative operating expenses would be the test of legality of transportation rates in this country. It did not say that if carriers can "afford" in particular instances to lower some of their rates so as to compete fairly the penalty of doing so would be to drag down their normal and more profitable but still reasonable non-competitive rates. It did not seek to introduce in this country a scheme for the allocation of freight traffic to the different forms of transportation agencies in such way as to put each into a vacuum and deprive the shipping public of healthy competition between them.

The Commission's action in the present case, taken as a result of its own declared "policy", clearly reveals an attempt on its part to fashion a motor carrier rate structure too rigidly related to comparative service costs as a means of dictating the fields of traffic which may be sought. True enough it seemingly would allow to motor carriers the maintenance of their 45 per cent rate basis, viewed merely as rates per 100 pounds; but it would require them to be made available, because it could be "afforded", to the exclusion of the more normal and slightly higher rates on smaller weight shipments and in disregard of the fact that railroad 45 per cent rates would apply only to the larger shipments. Well did the Commission know that those drastic limitations sought to be imposed upon the availability of the 45 per cent

rates would amply suffice to discourage their establishment as a carrier policy of rate-making to any comprehensive degree.

CONCLUSION

It is respectfully urged that the order of the Commission be set aside and its continued enforcement enjoined.

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OCTOBER TERM, 1943
No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY OF APPELLANTS TO THE BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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Supreme Court of the United States

OCTOBER TERM, 1943

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIERS CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC., *Appellants*, *vs.* THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*	No. 105

REPLY OF APPELLANTS TO THE BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

This short reply brief is respectfully submitted mainly for the purpose of disavowing certain contentions which the Government attributes to appellants and then devotes most of its brief to knocking down.

I

WHEN THERE EXISTS A DISCRIMINATION IN FACT AND HENCE IN LAW AS BETWEEN SHIPPERS UNDER DIFFERENT TRANSPORTATION RATES APPELLANTS DO NOT QUESTION THE AUTHORITY OF THE COMMISSION TO ORDER ITS REMOVAL FOR THE FUTURE EVEN IN THE ABSENCE OF PROOF OF HURTFUL INJURY TO PARTICULAR SHIPPERS.

Appellants in their main brief assert as a matter of law that no findings were made by the Commission indicating that *any discrimination in fact* as between shippers would

here occur in the future. Such findings as the Commission made on the subject show as a matter of law that no such discrimination in fact or law would exist. In that respect appellants' position is that there is offered to any shipper at any given locality the mere choice of rate and minimum weight dependent only upon the individual shipper's election of the particular weight to be tendered for shipment at one time on one bill of lading from one consignor to one consignee. There being no "multiple truck" rates involved, and the proposed 30,000 pound minimum weight being in accordance with general commercial standards as reflected by railroad carload minimum weights, there cannot possibly be any preferred class of "large" shippers or those whose distinctive economic position enables them to utilize the lower rates and higher minimum weight as against "small" competing shippers not so situated.

As if to overcome that fundamental contention of appellants' counsel for the Government say in their brief that the mere absence of shipper testimony of individual pecuniary damage does not, except in reparation cases, deprive the Commission of authority, as the guardian of the shipping public, to reach in the ordinary case a conclusion of discrimination. Appellants do not question the doctrine of law pointed to by the Government. They simply say it has no application to a case such as this where the contention is that without regard to the presence or absence of shipper witnesses concerning pecuniary damage the reports of the Commission show on their face there would be no unequal treatment of shippers either in fact or in law which would enable the Commission to make the character of order here involved.

II

WHEN CARRIERS OFFER A CHOICE OF TWO RATES DEPENDENT UPON THE MINIMUM SHIPPING WEIGHTS, EACH WITHIN THE ZONE OF REASONABLENESS, AND THERE IS NO RESULTING DISCRIMINATION IN FORM OR SUBSTANCE, THE ABSENCE OF A SHOWING OF DIFFERENCE IN CARRIER OPERATING EXPENSE CANNOT CREATE A DISCRIMINATION WHICH OTHERWISE IS LACKING.

Government counsel urge that in respect to rates and minimum weights between the same localities, over the same routes, carriers are not permitted, in the absence of a difference in operating expense, to offer to the shipping public a choice of different rates dependent upon the quantity shipped. In support of their position they cite and rely upon cases of the Commission and this Court in which, as a *justification* for an actual discrimination, the matter of differing carrier operating expense has been deemed of importance.

The position of appellants, in respect to that argument of the Government, is that it has no application to the issues which this case presents. If there be not otherwise forbidden discrimination between shippers then the comparative carrier operating expense is immaterial to any issue of discrimination. If, in this case, there appeared to exist a condition of threatened discrimination otherwise unlawful respondents would of course be under the compulsion of demonstrating that the discrimination would be justifiable because of a difference of carrier operating expense or because of some other dissimilar circumstance such as competition. But the mere absence of a demonstrated difference in carrier operating expense cannot cause two rates to be unlawfully discriminatory in their relation to each other when any shipper is at liberty to make the choice and there are no inherent economic infirmities which favor some to the disadvantage of others.

III

APPELLANTS DO NOT CONTEND THAT COMPETITION IS AN INVARIABLE DEFENSE TO A DISCRIMINATION OTHERWISE UNLAWFUL NOR DO THEY DENY THE COMMISSION'S POSSESSION OF POWER, UNDER PROPER FINDINGS, TO UPHOLD OR DENY THE DEFENSE OF COMPETITION IN ACCORDANCE WITH WHAT THE FINDINGS WOULD DICTATE. HERE THE COMMISSION MADE NO FINDINGS WHATSOEVER AS TO WHY COMPETITION SHOULD NOT PREVAIL.

Again appellants respectfully say that if there would be no discrimination in fact or in law no need exists for them to justify the difference in rates and minimum weights, as far as concerns the issue of discrimination, either on the ground of competition or anything else. However, they further say that even if it could be considered that some element of discrimination would be present in the tariffs here involved, their business course in proposing it is dictated by competitive necessity. To that they add the consideration that Congress favors healthy competition between carriers and ordinarily it is a proper defense which, when made as here, puts upon the Commission the clear duty of determining whether it is a proper defense and if not to say frankly why not.

Here the Commission rejected the defense of competition for no stated reason whatsoever. It asserted nothing more than the arbitrary authority to determine, as a matter of its own "policy", to deny the defense. Government counsel, seeking to support that unusual position of the Commission, say in their brief that while the Commission did not in terms so find yet what it did was to reject the defense competition because there was no showing of a difference in carrier operating expense.

There again the argument moves around the circle. The question of competition comes into the case at all only in the event some conclusion of discrimination shippers would otherwise be warranted in fact and in law. *Even in the absence of a demonstrated difference in carrier operating expense discrimination between shippers may be warranted by the presence of competitive necessity.* That was the holding of this Court in the recent *Barringer* case. The strength of the defense of competition in cases of actual discrimination would seem to be such that before the Commission, in any instance, may reject it, something in the nature of cogent findings would have to be made sufficient to satisfy this Court that the Commission's action was not purely arbitrary and based only upon its own declared "policy".

IV

APPELLANTS CONTEND THAT AS A MATTER OF LAW IT IS NOT UNREASONABLE FOR MOTOR CARRIERS TO OFFER A QUANTITY RATE GOVERNED BY A MINIMUM WEIGHT SOMEWHAT GREATER THAN MAY BE PHYSICALLY OR LEGALLY LOADED INTO SINGLE TRUCK VEHICLES WHEN THAT REQUIRED MINIMUM WEIGHT IS COMFORTABLY WITHIN THE ESTABLISHED TRADE UNITS OF SHIPMENT. THIS IS SO NOTWITHSTANDING THE CARRIERS' OPERATING EXPENSE PER 100 POUNDS, ALTHOUGH MUCH SMALLER THAN FOR LITTLE SHIPMENTS, IS NO LESS WHEN THE MINIMUM WEIGHT CALLS FOR THE PARTIAL USE OF A SECOND TRUCK VEHICLE THAN WHEN THE WHOLE SHIPMENT MAY BE PUT INTO ONE VEHICLE.

Government counsel do not question and the Commission did not find the absence of a sharp difference between carrier operating expense for little shipments (for instance 5000 pounds) and larger shipments such as 20,000 or 30,000

pounds. What the Commission here has done is to say that it is an unreasonable thing for motor carriers to offer any rate on quantity shipments when the prescribed minimum quantity applicable to that rate exceeds the amount that may be placed in a single truck vehicle, even though the minimum is in accordance with trade shipping units as measured by railroad carload minimum weights. In support of its position the Commission, both in its reports and now in the brief of Government counsel, relies only upon the historical fact that railroad carload rates have at all times since 1887 been governed by minimum weights not exceeding amounts which may be put into single railroad cars. The argument then is that having applied that rule for more than fifty years to railroads the same rule is applicable to motor carriers despite the smaller equipment which they use in order to insure safety of vehicle operations on the highways.

Appellants respectfully urge that the point of view of the Commission is purely arbitrary and is only a matter of its own "policy". The reason for the historical rule is inapplicable to the situation here. The origin of that old rule concerning railroads goes back to the idea that whereas most shippers are economically in position to ship single carloads only a relative few would be in economic position to ship in "multiple cars". Appellants here do not question the propriety of that broad rule in its application to railroads. Indeed they would not here question the impropriety of motor carrier rates if based avowedly upon "multiple truck" minimum weights which look to the favoring of a relatively few large shippers to the disadvantage of the greater number customarily conducting their businesses on ordinary trade units of sale. But what the motor carriers here do respectfully urge is that as long as their quantity minimum weights are comfortably within the established trade units of shipment as measured by railroad carload minimum weights it is neither unreasonable nor discriminatory for them to prescribe such minimum weights regard-

less of the fact that due to physical and legal load limitations their accommodation compels an overflow into a second truck vehicle.

CONCLUSIONS

It is believed that the foregoing establishes that for the most part, if not entirely, the Government's brief is based upon a misconception of the precise contentions which appellants make.

Respectfully submitted,

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Dated: December 10, 1943

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 105.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC., *Appellants*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY OF APPELLANTS TO THE BRIEF IN BEHALF OF INTERVENOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

CHARLES E. COTTERILL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 105.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC., *Appellants*,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY OF APPELLANTS TO THE BRIEF IN BEHALF OF INTERVENOR THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

Appellants respectfully submit the following short reply to the brief in behalf of The National Industrial Traffic League which was allowed by the Court to intervene on motion granted December 6, 1943.

I.

THE CITATION OF OTHER COMMISSION DECISIONS HOLDING UNLAWFUL MOTOR CARRIER MINIMUM WEIGHTS EXCEEDING INDIVIDUAL TRUCKLOAD QUANTITIES.

The League calls to attention that the decision of the Commission in the present case is one of a series of other recent ones like it which, on insistent protests of motor car-

rier interests throughout the country, the full Commission agreed to review by selecting this one as a test. Then counsel for the League turn around and cite the others of that same series of decisions as if supporting the present one.

When, with respect to a particular question of law, the point of view of the Commission is under examination by this Court, it adds no weight to the particular decision of the Commission under review that it has rendered a like decision in a series of other similar and recent cases.

II.

THE MATTER OF "POLICY."

Counsel for the League in their brief engage in much discussion of appellants' contention that by its own words the Commission decided this case upon considerations of its own policy and not that of Congress. Appreciating the seeming force of that contention of appellants the League endeavors to overcome it by ignoring the words which the Commission used and by attributing to the Commission nothing more than the statement of "doctrines and applied recognized rate making principles which are within and in inconsonance with the national policy of transportation as declared by the Congress."

In short the League seeks to support the Commission's order on the independent ground that it *is* consonant with the policy of Congress no matter what ground the Commission put its decision upon. But the Commission did not put its decision upon the ground of anything required by the "National Transportation Policy." The language used by it was that "*we* adopt as a policy." Not a word is said by the Commission concerning the intention of Congress itself in a factual situation of this kind. While the statute is quoted from by the Commission in that part of it which requires that motor carrier rates shall be as low as consistent with the maintenance of sound and efficient trans-

portation that particular part of the statute does not go to any of the questions of law here involved.

III.

THE REFERENCE TO CASES INVOLVING RAILROAD MINIMUM WEIGHTS.

Like government counsel and like the Commission itself the League, in its brief, stresses the long standing requirement of the Commission that the minimum weights which railroads may prescribe on their quantity shipments shall be influenced largely by the commercial units of buying and selling but shall not exceed the weights that may be loaded in individual railroad cars. It is considered by the League that those old decisions of the Commission dealing with railroads have acquired the force of law by reason of their consistency throughout fifty years of railroad regulation and that, therefore, the Commission may also now require motor carriers (the new form of transportation) to limit their minimum weights on quantity shipments to amounts that may be loaded into single *truck* vehicles "usually used."

That is the nub of this case. All of the appellees say the Commission may do that; appellants respectfully say the Commission may not. The reason for the rule in railroad cases has always been that trade and commerce have in general been accustomed to buying and selling commodities in quantities either somewhat less than but in any event no greater than single railroad carloads. Should the railroads offer still lower rates on "multiple cars" such as "trainloads" the Commission considers (rightly) that in practical effect they would result in unlawful favoritism of a comparatively few large shippers.

Here the motor carriers are not seeking to offer "multiple truck" rates. They are not seeking to prescribe motor carrier minimum weights on quantity shipments greater than ordinary commercial units of buying and selling. They are not seeking to introduce into trade and commerce any

new and larger minimum weights than the railroads prescribe. They ask only to be permitted to compete with the railroad carload rates and minimum weights and thus offer to the public the alternative service of motor or rail transportation on equal terms. They can "afford" to do so in the sense that their resulting earnings although not fully profitable will not be unduly low to themselves. For those shippers who may wish to sell in smaller lots corresponding to single motor vehicle loads a slightly higher but still just and reasonable rate, to be governed by a minimum weight of 20,000 pounds, would be offered. Because, in order to compete, motor carriers seek to maintain lower than their normal truckload rates on the larger quantities represented by railroad carload minimum weights is not an index of illegality.

There is no rational relation between the sizes of motor truck vehicles and lawful motor carrier quantity minimum weights made to meet railroad competition so long as the required motor carrier minimum weights are within established trade units of purchase and sale and do not in practical effect operate as a discrimination in favor of a few or a class of large shippers.

In the absence of an actual discrimination between different shippers the offering of a choice of two rates based on the quantity tendered at one time, each within the zone of reasonableness and the lower made to meet carrier competition, the absence of a difference in motor carrier operating expense is not material in law.

Respectfully submitted,

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Dated: December 14, 1943.

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In the Supreme Court of the United States

October Term, 1943

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC CONFERENCE, MOTOR CARRIER CONFERENCE AND CENTRAL PASSENGER MOTOR TARIFF BUREAU, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

In the District Court of the United States for the Southern District of New York

CIVIL No. 19–390

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION ET AL., PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the district court be affirmed.

This is a direct appeal from the final decree, dated March 17, 1943, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913 (28 U. S. C. 47), dismissing appellants' petition to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 17, 1941, was made pursuant to a decision of Division 3 (31 M. C. C. 193) which was affirmed by a decision of the full Commission (34 M. C. C. 641). It required the cancellation, as

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Since 20,000 pounds represents the largest amount of this type of commodity which can be loaded into the average truck, this proposal (in the first two parts of the schedule) presented a situation where a carrier offered a lower rate to the shipper of an amount in excess of one truckload (*i. e.*, the 30,000-pound rate) than to the shipper of a truckload amount. Upon protest of western trunk-line rail carriers, the Commission embarked upon investigation and suspension proceedings.

Appellant association sought to justify the lower rate on amounts in excess of truckload on the ground that it was necessary to meet the competition of rail rates based upon a 30,000-pound weight minimum. With respect to the railroads, however, this minimum weight represented the carload amount. It was found that the motor carriers would not have relatively lower operating costs when handling amounts in excess of truckload than when handling truckload amounts. Appellants have never denied that. Division 3 of the Commission concluded that the proposed schedules were unreasonable to the extent that they proposed to establish a minimum of 30,000 pounds. After oral argument before it, the full Commission not only reaffirmed the conclusion of Division 3 that the 30,000-pound minimum was unreasonable, but also concluded that the proposed rates, minimum 30,000 pounds, were illegal, under Section 216 (d) of Part II of the Interstate Com-

merce Act (49 U. S. C. 316 (d)), in that they were unjustly discriminatory to shippers of 20,000-pound lots. It based its conclusion on the absence of showing of operating savings under the 30,000-pound rate, and found the railroad competition no justification.

Appellants raise three principal contentions: That the Commission as a matter of law was required to consider the existence of rail competition as a justification; that the Commission could not properly base its conclusion that there was unjust discrimination on the factor of absence of economy in operating costs under the 30,000-pound rate; and that discrimination could not be found without a finding that some particular shipper was unable to furnish a large enough amount to avail himself of the 30,000-pound rate whereas other shippers could. It is submitted that these contentions present no substantial question and that the decree of the district court should therefore be affirmed without argument.

Appellants' contention that differences in competitive conditions are, as a matter of law, a defense in a discrimination case is effectively answered by the recent decision of this Court in *L. T. Barringer and Co.* v. *United States*, No. 520, this Term. It was there held that what is an unjust discrimination under Section 2* of the

* The Commission has always treated decisions involving discrimination and preference under the railroad provisions of the Interstate Commerce Act as equally applicable under

Interstate Commerce Act (49 U. S. C. 2) is a question of fact for the Commission and (pamphlet p. 5) "that it is for the Commission, not the courts, to say whether * * * differences [in competitive conditions] are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful." Even before the *Barringer* decision, it was firmly established by numerous rate cases involving undue preference or reasonableness, rather than discrimination in the technical sense, that differences in competitive conditions were not an absolute defense, but merely factors to be considered by the Commission. *E. g., Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166; *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515. In fact, prior to the *Barringer* decision it had been regarded virtually as a rule of law that competitive differences could not be considered as a justification for discrimination in the technical sense. *Wight* v. *United States*, 167 U. S. 512, 516–518; *Interstate Commerce Commission* v. *Alabama Midland Ry.*,

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the comparable provisions dealing with motor carriers and contained in Section 216 (d) of the Act (49 U. S. C. 316 (d)). *Arrangements-Arrow Carrier Corp. and Duplan Silk Corp.*, 4 M. C. C. 657, 677. This Court has apparently adopted the same view. *United States* v. *Chicago Heights Trucking Association*, 310 U. S. 344.

supra, 166; *Seaboard Air Line Ry.* v. *United States,* 254 U. S. 57, 62.[5] While the *Barringer* decision now gives the Commission the right to consider, on a factual basis, competitive conditions even in a discrimination case, it leaves the weight to be given that factor in a particular case entirely to the Commission. The factor of competition was given consideration[6] in the present case, yet found not controlling, and appellants accordingly have no legitimate complaint.

Appellants' argument that the Commission could not properly base its conclusion upon the absence of economy of operation under the 30,000-pound rate is equally without substance. Early in its history, the Commission adopted the view that the only discrimination which could

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[5] In both the *Wight* and *Seaboard* cases, in which competitive conditions were not considered a justification, the preferred shipper and the shipper discriminated against shipped over the same route. The same is true here. In the *Barringer* case, the justification for the differentiation based upon competitive conditions arose from the fact that the two shippers employed different routes.

[6] The Commission in its second report said in this connection (34 M. C. C. 641, 648):

"* * * The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided on the facts in each case. * * *

"The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination."

legally be made between a large shipment and a small one must be based upon the difference in cost of service. *California Commercial Association* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 431. While in view of the *Barringer* decision difference in cost of service cannot now be considered the only possible justification for what might otherwise be an unjust discrimination,[7] the presence or absence of that factor must still be considered the most important criterion. Thus, it has been recognized by this Court that the validity, as nondiscriminatory, of carload rates lower than less-than-carload rates, rests upon the presence of a saving in operating costs under the former. *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 240. And the Commission, even before the present case, in considering whether or not reduced rates on amounts in excess of truckload or in excess of carload were discriminatory, has looked[8] primarily

[7] Commissioner Eastman had recently expressed this view even before the *Barringer* case in his dissent in *Grain Proportionals, Ex-Barge to Official Territory*, 248 I. C. C. 307, 319.

[8] Because there was no showing of saving of costs under certain reduced rates on amounts in excess of truckload, the Commission condemned the rates as discriminatory in *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529, and in *Coal, Wyoming, to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335, 340. On the other hand, the Commission upheld lower rates on multiple carload lots in *Molasses From New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485. That case was construed

to the cost of service factor. Furthermore, this Court has recently sustained the conclusion of the Commission, based principally upon the absence of showing of operating cost saving, that another motor-carrier tariff resulted, like the present one, in unjust discrimination in favor of the large shipper, there a freight forwarder. *United States* v. *Chicago Heights Trucking Association*, 310 U. S. 344, sustaining the Commission's conclusions in *Chicago and Wisconsin Points Proportional Rates*, 10 M. C. C. 556, 569; 17 M. C. C. 573, 578–579.

The remaining contention, that it is necessary for the Commission to find injury to some particular shipper before concluding that there is unjust discrimination, was clearly rejected by this Court in *United States* v. *Chicago Heights Trucking Association, supra*, 353–354. It was there pointed

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by the Commission in its present decision and in the *Petroleum Products* case, *supra*, as having been based upon the existence of a saving in operating costs under these rates rather than upon the existence of competition as was argued by appellant association. The above cases, including the present one, represent, in fact, a more liberal attitude by the Commission than it had previously applied in considering the validity of lower rates on amounts in excess of carload. Prior to these decisions, the Commission had uniformly adopted the view that reduced rates on amounts in excess of carload were necessarily illegal, even when they resulted in operating savings, because of their tendency to discriminate in favor of large shippers and concentrate business in their hands. *Anaconda Copper Mining Co.* v. *C. & E. R. R. Co.*, 19 I. C. C. 592, 596; *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464.

out that in a discrimination case the Commission may act in a public capacity in the interests of shippers generally without complaint from individual shippers. In the present case, as a matter of fact, while shippers did not appear at the hearing, a representative of all but two of the linoleum manufacturers in the United States appeared in opposition to the rates (34 M. C. C. 641, 645–646).

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 105

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 41–44) is reported in 48 F. Supp. 432. The reports of Division 3 of the Interstate Commerce Commission (R. 9–19) and of the full Commission (R. 21–32) appear in 31 M. C. C. 193 and 34 M. C. C. 641.

JURISDICTION

The final decree of the district court was entered on March 5, 1943 (R. 44–45), and appellants' motion for rehearing was denied on March 17, 1943. The petition for appeal was filed on May 5, 1943, and the appeal was allowed on May 7, 1943 (R. 48). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted by this Court on October 11, 1943 (R. 71).

QUESTIONS PRESENTED

The ultimate question concerns the validity of the Interstate Commerce Commission's determination that the motor-carrier rates in question were unjustly discriminatory and unreasonable in violation of Part II of the Interstate Commerce Act. The tariffs involved prescribed more favorable rates between the same points for those who shipped amounts in excess of a truckload than for those who shipped truckload amounts.

Subordinate questions are:

1. Whether the Commission might properly condemn the rates because there was no showing that

the cost of furnishing the transportation was relatively less for the larger amounts.

2. Whether it was required to consider railroad carload-rate competition a justification for this difference in treatment.

3. Whether the Commission could condemn the rates without a showing of injury to some particular shipper.

STATUTE INVOLVED

The pertinent provisions of Parts I and II of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 39-44.

STATEMENT

The facts, as they appear from the reports of the Commission, are as follows:

Appellant Eastern-Central Motor Carriers Association,[1] an incorporated association of common carriers by motor vehicle, filed certain rate schedules with the Commission on behalf of its members to become effective August 24, 1940 (R. 10). These carriers proposed to establish on hard-surface floor covering (hereafter referred to as linoleum) between various points in the East and certain points in the Midwest, rates 47.5 percent of first class,[2] minimum 20,000 pounds, and 45

[1] This is the principal appellant. The other appellants are also associations of motor common carriers who were permitted to intervene before the district court.

[2] The following discussion by Commissioner Eastman in *All Freight to Pacific Coast*, 248 I. C. C. 73, 88, may

percent of first class, minimum 30,000 pounds (R. 10–12). Prior thereto, these carriers had maintained rates 50 percent of first class, minimum 20,000 pounds, on linoleum between these points (R. 11). It was physically impossible to load 30,000 pounds of the linoleum into a single unit of equipment operated by these carriers, but the 20,000-pound minimum did represent a truckload weight of linoleum.[3] These rates were designed to meet the carload rates on linoleum, minimum 30,000 pounds, of the rail carriers between these

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prove helpful to the Court in explaining these rate designations:

> As is well known, the classifications of freight which the railroads [and also motor carriers] publish are for the purpose of governing the application of their class rates. The latter are used when no rate has been published applying specifically to the movement in question, such specific rates being called commodity rates. The railroads carry, of course, a vast multitude of separate and distinct commodities, and the class rates are a convenient device for avoiding the publication of a like multitude of separate and distinct rates. The rates for the several classes are graded in level, first class being taken as 100 percent and the other classes being given successively lower percentages, and the commodities are distributed by the classification among these various classes.

The rates here are classification-exception or commodity rates.

[3] The Commission so found (R. 17, 29). The full Commission remarked in this connection (R. 29):

> With respect to linoleum, the minimum truckload weight established by the motor carriers between the points herein is 20,000 pounds. This truckload

points, which at that time were 45 percent of first class. (R. 11, 16.) Upon protests of the western trunk-line carriers,[4] operation of the proposed schedules was suspended and the rates were made the subject of investigation and suspension proceedings by Division 3 under Section 216 (g) (*infra*, pp. 40-42) of Part II of the Interstate Commerce Act (R. 10).

Division 3, in a decision of November 17, 1941 (R. 9–19), concluded that the rates were just and reasonable and otherwise lawful except to the extent that they proposed to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds was unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable (R. 19). Accordingly, on the same day the proposed schedules, to the extent found not just and reasonable, were ordered canceled (R. 19, 20).

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minimum weight was determined upon a consideration of the loading characteristics of the commodity and the size of truck ordinarily used in its transportation. Although 22,000 pounds can be loaded in respondents' trucks, the minimum of 20,000 pounds is not to be condemned because some reasonable leeway may be allowed between the truckload minimum weight and the maximum carrying capacity of the truck. This maximum carrying capacity is the amount which can be carried under the laws of the States through which the trucks move.

[4] At the hearing, the rail carriers, the only protestants, withdrew without offering evidence when the motor carriers agreed to adopt certain modifications in connection with the rules to be applied under these tariffs (R. 10, 22).

The report of the division contains the following pertinent discussion (R. 18–19):

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. * * * The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no

showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The case was subsequently reviewed by the full Commission and further briefed and orally argued (R. 22). The National Industrial Traffic League, as well as a representative of all the linoleum manufacturers in the United States except two, appeared in opposition to these rates, urging affirmation of the decision of Division 3 (R. 27). Proponents of the rates rested their case before the full Commission on the theory that the motor carriers could adopt rates governed by minimum weights corresponding to the carload-weight minima of the railroads, in order to meet rail competition, irrespective of whether such minimum weight of goods could be carried relatively more cheaply than a smaller amount on which there was a higher rate (R. 23–24).

The full Commission issued its decision on August 11, 1942 (R. 21–32). It affirmed the findings of Division 3 that the rates were not unjust or unreasonable except to the extent the 45 percent rates were subject to a 30,000-pound minimum (R. 31).[5] In addition, the full Commission condemned the

[5] The second full paragraph of the opinion beginning, "Upon oral argument, we find * * *," appearing at page 31 of the record, was printed in error. This paragraph was deleted from the official report of the Commission's decision. See 34 M. C. C. 648–649.

latter rates on another ground—that the "proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots" (R. 31). In view of the fact that the carriers had already complied with the order of Division 3 and established rates of either 45 percent or 47.5 percent of first class, both with a minimum of 20,000 pounds, the full Commission issued no further order (R. 31–32).

The following excerpt from the full Commission's report deals with the issues here involved (R. 30–31):

> Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of

transporting quantities exceeding a truckload is less than that of transporting a truckload. In the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.

The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a

finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination.

On October 13, 1942, appellant Eastern Central Motor Carriers Association instituted suit in the United States District Court for the Southern District of New York, to set aside Division 3's order of November 17, 1941 (R. 1–8). As previously indicated, the other appellant associations were permitted to intervene as plaintiffs. Final hearing was held before a specially constituted three-judge court on November 2, 1942 (R. 44). The court entered a written opinion on January 2, 1943 (R. 41–44). It entered findings of fact and conclusions of law on February 9, 1943 (R. 39–40), and a final decree dismissing the complaint on March 5, 1943 (R. 44–45). Appellants' motion for rehearing was denied by the court on March 17, 1943.*

* This order was omitted in printing the record but appears at page 52-E of the original record before this Court.

SUMMARY OF ARGUMENT

I

The Commission properly held that the difference in rates between the 20,000-pound shipper and the 30,000-pound shipper was unjustly discriminatory and unreasonable.

The Commission did not lay down any rate-making policy of its own not warranted by the statute. Its declaration that it would regard a difference in rates such as existed here as unjustly discriminatory and unreasonable unless justified by a differential in transportation costs and despite the existence of railroad competition, was merely a reflection of its informed judgment that under the statutory policy forbidding unjustly discriminatory and unreasonable rates, these rates were unlawful. Within its statutory sphere, the Commission is in fact a policy-making body. Questions of what is an unreasonable rate and what is an unjust discrimination are questions of ultimate fact for the Commission's determination, and the courts will not interfere with the Commission's decisions with respect thereto except for error of law or other unusual circumstances. *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 456; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7. The Commission did not depart from the applicable legal standard in discrimination cases,

which is that the differences in circumstances to be considered as a possible justification for the discrimination must relate to the transportation services performed and not be extraneous thereto. *Wight* v. *United States,* 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.,* 225 U. S. 326, 342; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6. Differences in the cost of furnishing transportation are obviously germane to the transportation services performed and therefore under the above standard a proper factor to be considered by the Commission in ascertaining whether different treatment of different shippers is unreasonable or unjustly discriminatory, as this Court has recognized. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad,* 145 U. S. 263, 281–282; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.,* 220 U. S. 235, 240–241, 252; *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346, 348. The Commission did not hold that it was not legally authorized to consider the defense of railroad competition. Instead, it weighed this defense and found it an insufficient justification for the different treatment of these shippers. The existence of competition and the weight to be given to it as a justification are exclusively factual questions for the Commission rather than for the courts, and the Commission is not required to set forth its exact reasons for not considering the existence of competition a controlling justification here.

Condemnation of the present rates was in accord with the Commission's consistent policy of rejecting as unlawful all discrimination between shippers based upon the size of the shipment presented unless it is shown that the differences in treatment reflect differences in relative transportation costs.

II

It is immaterial that individual shippers of 20,000-pound lots may in fact be in an economic position to furnish 30,000-pound lots instead, and thus secure the lower rate on the 30,000-pound shipments. Any contention to the contrary is necessarily based on the assumption that the Commission is powerless to prevent discrimination and unreasonable rate differences, in a case where reparations are not involved, unless pecuniary damage to individual shippers is established. But this Court has recognized that the Commission in its capacity as protector of the general shipping public may in such a case strike down such practices without proof of damage to individual shippers. *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458, 462; see *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 353–354.

ARGUMENT

I

THE COMMISSION PROPERLY HELD THAT THE DIFFERENCE IN THE RATES WAS UNJUSTLY DISCRIMINATORY AND UNREASONABLE

A. THE COMMISSION'S ACTION IN CONDEMNING THIS DIFFERENCE IN RATES BECAUSE THERE WAS NO SHOWING THAT IT WAS BASED ON CORRESPONDING DIFFERENCES IN THE COST OF FURNISHING THE TRANSPORTATION AND DESPITE THE EXISTENCE OF RAILROAD COMPETITION, WAS WITHIN ITS STATUTORY POWER

Part II of the Interstate Commerce Act (Section 216 (d), *infra*, p. 40) makes it unlawful for motor carriers to charge rates which result in "unjust discrimination" or are "unjust and unreasonable." The phrases "unjust and unreasonable" and "unjust discrimination" are unquestionably words of art borrowed[1] from well-known corresponding language in Part I of the Act forbidding similar practices by rail carriers (Sections 1 (5) (a) and 2, 49 U. S. C. 1 (5) (a) and 2, Appendix, *infra*, p. 34). Accordingly, the Commission has frequently recognized that administrative and judicial precedents dealing

[1] The legislative history of the original Motor Carrier Act of 1935 (49 Stat. 543) indicates that the Act was intended to be part of a complete and coordinated program of legislation touching all forms of transportation. See S. Rep. 482, 74th Cong., 1st sess., p. 3. This general program was carried to fruition by the Transportation Act of 1940 (54 Stat. 898), when water carriers were also subjected to the Commission's jurisdiction.

with unjust discrimination by railroads under Section 2 must be given proper significance in dealing with questions of discrimination by motor carriers. *E. g., Arrangements Arrow Carrier Corp. and Duplan Silk Corp.,* 4 M. C. C. 657, 677; *Chicago and Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 578; *Consolidation Rule on Shipments at Seattle and Spokane,* 22 M. C. C. 295, 299. This Court has followed the same pattern by implication, citing railroad discrimination decisions as applying in motor-carrier discrimination cases, and motor-carrier decisions as applying in railroad discrimination cases. *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352–353; *Barringer & Co.* v. *United States,* 319 U. S. 1, 7–8. No reason appears why the same weight should not be given under Part II to precedents dealing with reasonableness of rates under Part I.

With the importance of the railroad precedents in mind, we approach appellants' principal contention. This is the contention that the Commission's decision is void because it laid down a policy of its own allegedly not warranted by the statute, that it would regard a difference in rates such as existed here as unjustly discriminatory and unreasonable[8] unless based on a differential

[8] Merely because each of these rates was found by the Commission, so far as absolute level was concerned, to be within the zone of reasonableness (R. 31) does not mean that the Commission was powerless to consider them un-

in transportation costs and despite the existence of railroad carload-rate competition (Br. 12–16). Reliance is placed by appellants in this connection solely on *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 443,[9] where an order of the Commission was set aside because it had rejected railroad rates not because they were unreasonable, as it might have done under the statute, but merely because they were regarded as inequitable to shippers. The inapplicability of this case is readily apparent. Here the Commission's declaration of policy, if it may be called such, as in *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 525–526, was not a statement of a policy of rate-making of its own not warranted by the statute, but merely a reflection of its informed judgment that under the statutory policy prohibiting unjustly discriminatory and unreasonable rates the present rates were unlawful.

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reasonable in relation to each other because of their discriminatory nature. Rates or practices have often been held unreasonable because of their discriminatory nature. *E. g., Atchison, T. & S. F. Ry.* v. *United States*, 279 U. S. 768; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346. Minimum-weight provisions clearly affect the total charges for transportation. *Wheler Co.* v. *Director General*, 59 I. C. C. 699, 701.

[9] Appellants cite two other cases (*Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, and *United States* v. *Illinois Central R. R.*, 263 U. S. 515) but admit that the Commission's orders were upheld in those cases (Br. 15).

Appellants completely overlook the fundamental proposition that the Commission, within its appointed statutory sphere, is a policy-making body. The determination of the validity of rates is peculiarly a task for the Commission, exercising an enlightened judgment as an expert body, a task which the Commission by training and experience is well qualified to perform.[10] *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286. It is a familiar rule that both the questions of what is an "unreasonable" rate and what is an "unjust discrimination" are questions of ultimate fact to be decided by the Commission in the exercise of its judgment and discretion and that the courts will not interfere with the Commission's determination of these questions unless the determination is unsupported by evidence, without rational basis, based upon an erroneous construction of law, or otherwise amounts to an abuse of power. *Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, 194, 196; *Illinois Central Railroad* v. *Interstate Commerce Commission,* 206 U. S. 441, 455, 456; *Interstate Commerce Commission* v. *Chicago,*

[10] Judge Dobie recently stated in speaking of the Commission in *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 83 (W. D. Va., three-judge court):

> The notion that only a court (if anyone) can "discover" and "announce" rules of law which are immutable principles to be plucked from the sky and applied with inexorable logic is a philosophy of jurisprudence to which this Court does not subscribe.

Rock Island & Pacific Ry., 218 U. S. 88, 110–111; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7.

The particular application of these principles to decisions of the Commission involving discrimination under motor-carrier rates is well illustrated by the following excerpt from the *Chicago Heights Trucking Co.* case (310 U. S. 344, 352–353):

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." [*United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.] And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." [*Idem.*] * * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful

> discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination. [Cases cited.]

While the Commission must follow recognized legal standards in condemning or condoning discrimination, the only criterion which has been developed for this situation is that the difference in circumstances to be considered as a possible justification for the discrimination must relate to the transportation services performed and not be extraneous thereto. *Wight* v. *United States,* 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.,* 225 U. S. 326, 342; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6. In the *Barringer* case, this Court said last Term (319 U. S. 1, 6):

> *But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar."* Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of

> the particular shipper *rather than to circumstances attending the transportation service,* is a question of fact for the Commission's determination. * * * [Italics supplied.]

It was apparently because the Commission departed from this standard and sought to sustain a discrimination as not unjust on differences not germane to the transportation service performed, that its order considered in *Mitchell* v. *United States,* 313 U. S. 80, was set aside.

In the present case, it is plain that the Commission, in exercising its judgment, followed this legal standard. It considered that the important difference in conditions, which appellants would have to prove to justify the more favored treatment of shippers of amounts in excess of truckload, as compared with truckload shippers, was that the favored treatment should reflect corresponding savings in the relative cost of furnishing the transportation. Certainly differences in cost of furnishing transportation are, on their face, germane to the transportation service performed, and thus under the above standard a proper factor to be considered. This Court has frequently recognized that difference in costs is a vitally important consideration as a possible justification for discriminations which might otherwise be unjust. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad,* 145 U. S. 263, 281–282; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.,*

220 U. S. 235, 240–241, 252, where it was said that—

> The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. * * * (220 U. S. 235, 252.)

Similarly, in cases involving the issue of reasonableness of particular rates, cost of furnishing the service has been considered an important factor in considering the level of the rate (*Northern Pacific Ry.* v. *Dept. of Public Works,* 268 U. S. 39, 43), and differences in revenue considerations have been treated as a possible justification for different treatment of shippers. *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346, 348.

There was likewise nothing illegal in the Commission's failure to treat appellants' claim as to the existence of rail competition as a justification for this difference in rates. Reference to the Commission's report (*supra,* pp. 9–10) reveals that the

Commission did not indicate that it thought it was powerless to consider the defense of competition here. The Commission merely said that the "extent to which competition between carriers may render discrimination * * * not unlawful must be decided upon the facts in each case" (R. 30) and held that in the instant case, everything considered, "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination" (R. 30–31). In other words, the Commission weighed the defense of competition and found it an insufficient justification. This Court has recognized that there is a clear distinction between refusing to consider competition at all, and in refusing, after weighing it, to treat it as an absolute defense. Thus, orders of the Commission have been set aside where the Commission adopted the view that it was powerless under the language of the statute to consider competition as a defense to charges that rates were unlawful under various provisions of Part I. *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 204, 207, 210; *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648, 672–673. But, in contrast, it has been held that the questions of the existence of competition and the weight to be given to it as a defense are exclusively factual questions for the Commission, in

which its decision will not be overridden by the courts, whether the inquiry is as to the reasonable, prejudicial or discriminatory nature of rates. *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166; *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455–461; *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 525;[11] *Barringer & Co.* v. *United States*, 319 U. S. 1, 7. In the *Barringer* case, the following was said with particular reference to discrimination (319 U. S. 1, 7):

> It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. * * *

And merely because the Commission has the power to prevent destructive competition by fix-

[11] In that case, the Court said: (263 U. S. 515, 525):

> The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law; by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. * * *

ing the level of rates at a reasonable minimum certainly does not mean, as appellants urge (Br. 30–33), that all competition must be accepted as an absolute excuse for discrimination between shippers.

While the weight given to competition by the Commission is thus not open to review, it may be pointed out that there was, nevertheless, a clear basis for the Commission's conclusion that the existence of railroad competition in the present case did not justify this rate discrimination. It is to be remembered that this Court for a long time held that while competition might be considered a defense to a charge of undue preference under Section 3, the Commission could not lawfully consider competition at all when the alleged violation was of Section 2 (*i. e.*, discrimination, in the limited technical sense, between two shippers over the same line between the same points, as in the present case). *Wight* v. *United States*, 167 U. S. 512, 516–518; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166–167; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. Nevertheless, in the *Barringer* case, it was held that competition might be considered as a possible defense even in a Section 2 discrimination case, though, as above indicated, it was held that the weight to be given to competition was for the Commission. The facts of the *Barringer* case were, however, somewhat anom-

alous. Section 2 was recognized as applying because the loading services involved were identical and despite the fact that the related line-hauls were over different routes. The differences in competition held to be a justifying factor under Section 2 there actually related to differences in competition over different routes. While this distinction can scarcely be said to go to the power of the Commission to consider competition as a defense, it can certainly be considered in determining the weight to be given competition as a justification. Rates involving the same commodity over different routes are necessarily subject to more competitive influences than those involving the same commodity over the same route. Preferred treatment of the large shipper over the small shipper with respect to shipments over an identical route may well be considered a more egregious form of discrimination, merely because of its tendency to concentrate business in the hands of those already large.

Contrary to appellants' contentions (Br. 28–29), the Commission was not required to make a specific finding of fact as to why it did not consider the existence of rail competition a justification here. The Commission is required only to set forth the basic or quasi-jurisdictional facts upon which its opinion rests and is not required to "specify the weight given to any item of evidence or disclose mental operations by which its decisions are

reached." *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359; *United States* v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454, 464–465.

Nor is there any indication that the Commission in its decision attempted to allocate traffic between the motor carriers and railroads on the basis of their unit costs of operation or otherwise, as appellants urge (Br. 36–39). Motor carriers are left free to compete with railroad carload-rates. All that the Commission insists upon is that the motor carrier in meeting the railroad rates on carload lots, accord to shippers of truckload amounts, where the relative cost of transportation is no greater, the same rate accorded to those shipping larger amounts.

B. THE COMMISSION'S ACTION WAS IN ACCORD WITH ITS CONSISTENT POLICY OF CONDEMNING ALL RATE FAVORITISM BASED ON THE SIZE OF THE SHIPMENT, EXCEPT WHERE THE DIFFERENCES IN TREATMENT REFLECT DIFFERENCES IN RELATIVE TRANSPORTATION COSTS

The condemnation of the present rates by the Commission was plainly in accord with the policy consistently followed by it of rejecting as unlawful all discriminations between shippers based upon the size of the shipment presented unless it is shown that the differences in treatment reflect differences in relative transportation costs. See Sharfman, *The Interstate Commerce Commission* (1931), Vol. III–B, pp. 395–413.

The Commission gave voice to this principle early in its history. In *California Commercial*

Association v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 431,[12] it observed:

> It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service. It necessarily follows that when this difference in the cost of service is eliminated, the reason for the discrimination entirely fails. * * *

Even earlier, in 1888, the Commission had accepted the validity of lower railroad rates per unit on carload amounts than on less-than-carload amounts. But the Commission made it clear that it was not granting any vague concession to quantity transport, but according recognition to marked differences in cost between two sharply distinguishable modes of shipment. *Scofield* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 90, 93. The importance of the cost differential as a justification for lower carload rates was empha-

[12] The Commission there condemned as discriminatory the exaction by a carrier of a higher rate for handling an amount of merchandise when owned by several individuals and bulked together, than when presented by a single consignor. This was on the ground that the cost of handling the bulked shipment was no greater. These same principles were followed by the Commission in another similar case decided the same day, *Export Shipping Co.* v. *Wabash Railroad Co.*, 14 I. C. C. 437, and the Commission's decision in the latter case was sustained in *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 248.

sized by this Court in *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 240–241, where it was said:

> Without detailing the theory upon which this conception was based it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment, and rested upon the difference which existed between the cost of service in the case of a carload shipment by one consignor to one consignee and that occasioned by a shipment in one car of many packages by various consignors to various consignees. * * *

From the beginning also, and almost without exception since, the Commission has condemned railroad rates which were lower on trainload or multiple-car lots than on carload lots.[13] Likewise, the Commission has consistently refused, as in the present case, to approve motor-carrier rates which were lower for amounts in excess of truckload than

[13] *Paine Bros. & Co.* v. *Lehigh Valley R. Co.*, 7 I. C. C. 218, 223; *Planters' Compress Co.* v. *Cleveland, C., C. & St. L. Ry. Co.*, 11 I. C. C. 382, 403; *Anaconda Copper Mining Co.* v. *Chicago & E. R. Co.*, 19 I. C. C. 592, 596; *Rickards* v. *Atlantic Coast Line*, 23 I. C. C. 239, 240; *Woodward-Bennett Co.* v. *S. P., L. A. & S. L. R. R. Co.*, 29 I. C. C. 664, 665; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464; *J. W. Wells Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 38 I. C. C. 464, 465; *Miller & Lux* v. *S. P. Co.*, 41 I. C. C. 617, 619–620; *Molasses From New Orleans, La. to Peoria and Pekin, Ill.*, 235 I. C. C. 491–498.

for truckload amounts.[14] The basis generally announced for this principle was that such rates would discriminate in favor of large shippers at the expense of small shippers,[15] but some of the

[14] *Iron and Steel from Pittsburgh and Aliquippa, Pa.*, 21 M. C. C. 791, 792; *Trunk Line Territory Motor Carrier Rates*, 24 M. C. C. 501, 582; *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340–341.

While the Commission did approve certain rates subject to a minimum of 30,000 pounds (in excess of a truckload) in *Carpets and Carpeting, Official to Southern Territory*, 237 I. C. C. 651, that decision did not purport to be conclusive on the issue. Thus, the Commission said in that case (at pp. 657–658):

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

The full Commission said of that decision in its present decision (R. 31):

> That report was issued over a year ago and now we are convinced that * * * our doubts as expressed therein [were] well founded * * *.

[15] See, *e. g.*, *Anaconda Copper Mining Co.* v. *Chicago & E. R. Co.*, 19 I. C. C. 592, 596.

cases have indicated that such a rate difference was also unreasonable."[16]

It is apparent that originally reduced rail rates based upon minimum weights in excess of carloads were held unlawful by the Commission even though it was shown that the carrier could transport such weights more economically than carload weights. Thus, the Commission stated in *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464:

> The Commission has declined in notable instances to allow economies of carriage to control in the matter of setting preferential rates. For example, it has repeatedly and without exception refused not only to establish, but even to permit, the establishment of rates available only for the shipment of a trainload. Though such shipment could be transported at a minimum of expense per unit of weight and the carriers could well afford to make lower rates upon it, yet those rates would so discriminate in favor of the large shippers and tend to concentrate the business in their hands that proper considerations have compelled disapproval. * * *

However, in 1939, the Commission, to some extent relaxed this strict rule and for the first and only time held not unlawful certain railroad rates which were lower on multiple-carload shipments than

[16] *Rickards* v. *Atlantic Coast Line*, 23 I. C. C. 239, 240; *Miller & Lux* v. *S. P. Co.*, 41 I. C. C. 617, 619–620; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340.

on carload shipments. *Molasses From New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 491. It appears from the Commission's report that while this reduced volume rate was designed to meet the competition of cargo movements by private barge, the railroads also established that their operating costs would be considerably less when a single multiple-car consignment was presented than when a single car was presented. The Commission has since recognized, as it did in the present case (R. 28), that it regarded the crucial, justifying factor in the *Molasses* case as not solely competition, but rather the existence of the saving in costs under the multiple-car shipments. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529. And where there was not a complete showing made as to a cost differential; it has since refused to approve both multiple-carload rates and motor-truck rates in excess of truckload capacity. *Petroleum Rail Shippers' Ass'n* v. *Alton & S. R.*, 243 I. C. C. 589, 642–655; *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340.

Finally, it should be noted that the Commission has also held invalid, as discriminatory, railroad rates on freight shipped in containers, which were relatively higher for one minimum weight than for an alternative and greater minimum weight. *Container Service*, 173 I. C. C. 377. There again, the necessity for a showing of cost differential as

a justification for this difference in treatment was emphasized, the Commission observing (at pp. 443–444):

> * * * as we interpret section 2 of the act, and as it has been interpreted for us by the Supreme Court, we cannot approve varying rates based on the weight of the lading offered for container shipments except upon a record which establishes that charges so determined are warranted by differences in the cost and quality of the service. * * *

Surely then, it is evident that the Commission's insistence upon a showing of a cost differential in the present case and its refusal to consider railroad competition controlling, were in accord with its settled practice. Such a well-established test for determining whether proposed rates would result in "unjust discrimination" and be "unjust and unreasonable" (sec. 216 (d) and (g)) is entitled to great weight. Cf. *Boston & Maine R. R.* v. *Hooker,* 233 U. S. 97, 118; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *United States* v. *Chicago North Shore R. R.,* 288 U. S. 1, 13.

II

THE COMMISSION'S ORDER IS VALID EVEN IN THE ABSENCE OF A SHOWING THAT ANY INDIVIDUAL SHIPPER WOULD NECESSARILY SUFFER DAMAGE FROM THIS DISCRIMINATION

Appellants contend (Br. 16–21) that the Commission's order is invalid because there was noth-

ing in the record to show that any shipper who could secure the 20,000-pound rate could not just as well furnish enough linoleum to secure the lower rate on 30,000 pounds, and thus no showing that there would in fact be discrimination against any individual shipper.

It may be pointed out that there is nothing in the record before the Commission to support the statement (Br. 17) that 30,000 pounds is the normal unit of quantity purchase and sale of linoleum. The fact that the railroads fix their carload rates with a 30,000-pound minimum, upon which appellants rely, does not so indicate for, as the Commission points out (R. 29), "the primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment." The comparable weight for trucking equipment was, in the Commission's opinion, the truckload amount of 20,000 pounds (R. 29).

But the contention, in any event, is the equivalent of asserting that a rate cannot be condemned as discriminatory or unreasonable in the absence of a showing that individual shippers will suffer pecuniary damage therefrom. It overlooks the fact that under settled principles the Commission may, in its capacity as protector of the general shipping public, strike down rates as discriminatory or un-

reasonable without any such showing.[17] It was so held with respect to the question of reasonableness in *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458, 462, where it was pointed out that—

> The commission has power to determine rates to be unreasonable in violation of § 1 without determining whether their application has resulted or will result in pecuniary damage to the shipper. * * *

This same principle has in effect been recognized by the Commission in many discrimination cases, where it has been held that a complainant in such a case need not establish that he is in a competitive relationship with the allegedly preferred shipper. *National Spring & Wire Co.* v. *Director General,* 60 I. C. C. 564, 566; *Barber Asphalt Co.* v. *L. & N. R. R.,* 88 I. C. C. 307, 309; *Chicago & Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 579. This principle was recognized also with respect to motor-carrier discrimination in *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, sustaining the Commission's action in the *Chicago & Wisconsin Points* case, where it was said (310 U. S. 344, 353–354):

> The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commis-

[17] While a showing of pecuniary injury is, of course, essential to the granting of reparations under Part I of the Act (secs. 13–16), it is to be noted that the Commission is not empowered to grant reparations under Part II.

> sion's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. * * *

See also *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157.

In the *Chicago Heights Trucking Co.* case, less-than-truckload rates had been established from a so-called reforwarding point, which were lower on traffic that had moved into the reforwarding point as part of a truckload or carload consignment than on traffic that had not so moved. This Court sustained the Commission's conclusion that such rates constituted an unjust discrimination in favor of freight forwarders and against other shippers. Presumably, these other shippers might have avoided damage from this discrimination by employing the forwarders; yet there is no indication that this fact was considered at all material by the Commission or the Court. Furthermore, the fact that under Section 216 (g) (*infra*, pp. 40-42) the Commission is authorized to institute investigation and suspension proceedings with respect to rates, on its own initiative, as well as on the complaint of interested parties, is a strong indication that Congress did not consider damage to individual shippers essential.

There is nothing contrary to these principles in *Penn Refining Co.* v. *Western New York and P. R. Co.*, 208 U. S. 208, and *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, upon which appellants rely (Br. 17–19). In the former case, this Court refused to enforce a reparation order of the Commission, granting an award of damages to shippers of oil in barrels, based on discrimination against them in favor of oil shipped in tank-cars. The alleged discrimination grew out of the carriers' practice of charging for the weight of the container on barrel shipments but not on tank-car shipments. The Court refused to enforce the order because it was found that the barrel shippers were not in an economic position to have used tank-cars and never had asked for them. If this case is to be considered an indication that pecuniary damage to shippers is necessary to establish unjust discrimination, it is readily distinguished by the fact that the Court had before it a reparation case. Naturally, proof of personal damages is necessary for the recovery of a money award for past overcharges. But that does not mean that it should be considered necessary in a case such as the present where the Commission is only ordering cessation for the future of unreasonable rate differences and discrimination. Cf. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370. In the *Diffenbaugh* case, the Court set

aside a Commission order which had condemned the practice whereby carriers paid grain dealers who owned elevators an allowance for elevating their own grain. The Commission had held that this resulted in undue preference in their favor as against dealers who did not own and operate elevators, and the case was thus strictly one involving undue preference rather than unjust discrimination. While the Court observed that the law does not "equalize fortune, opportunities or abilities" (222 U. S. 42, 46), the decision was rested squarely on the fact that Congress only a short time before had specifically authorized the payment of reasonable allowances by carriers to shippers for performing part of the carriers' transportation for them.

Finally, it should be noted too that in the present case the shippers themselves were in fact concerned over this discrimination, as is indicated by the following statement, appearing in the report of the full Commission (R. 27):

> At the oral argument, a representative of all of the manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound and request that we affirm the findings of division 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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DECEMBER 1943.

APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (5) (a) provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 2 provides:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 216 provides in part:

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

(g) Whenever there shall be filed with the Commision any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by rail-

road and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in

bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. (49 U. S. C. 316 (d) and (g).)

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DEC 2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

Docket No. 105.

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, ET AL., *Appellants*,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

MOTION FOR LEAVE TO INTERVENE.

LUTHER M. WALTER,
NUEL D. BELNAP,
JOHN S. BURCHMORE,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

MOTION FOR LEAVE TO INTERVENE.

Now comes The National Industrial Traffic League, an unincorporated voluntary association, and respectfully represents that it has an interest in the matters and questions involved in the above-entitled cause; that it participated in the underlying administrative proceedings before the Interstate Commerce Commission, in opposition to the motor common carriers respondents therein, which proceedings led to the assailed orders entered by the commission, and that it desires to participate in the argument of this cause on the side of appellees.

Under the Statute, Chapter 28 U. S. C. A. Section 45a (Judicial Code Secs. 212, 213, amended), in any suit wherein is involved the validity of an order of the Interstate Commerce Commission (such as in this case) any party or parties in interest to the proceeding before the Commission may appear as parties thereto on their own motion and as of right, and be represented by counsel. The same section contains further *proviso* under which associations who are interested in the controversy or question before the Interstate Commerce Commission may intervene in said suit or proceedings in court at any time after the institution thereof.

The National Industrial Traffic League had no notice of the proceedings in the District Court until after argument was had before the three-judge statutory court and therefore, did not appear in the court below.

The findings and decree of the District Court are satisfactory to petitioner; and your petitioner desires to support the position of appellee United States and Interstate Commerce Commission, and to bring to the Court's attention the interest of the members of this association as shippers and receivers of freight in the questions involved.

WHEREFORE, Petitioner prays leave to intervene, to file brief, and to participate in oral argument, if had.

Dated at Chicago, Illinois, this 29th day of November, 1943.

LUTHER M. WALTER,
NUEL D. BELNAP,
JOHN S. BURCHMORE,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF IN BEHALF OF INTERVENER, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

BRIEF ON BEHALF OF INTERVENER.

This is an appeal from the decree and judgment of a statutory District Court, whose opinion is reported 48 F. Sup. 432, dismissing suit of appellants to set aside an order and reports of the Interstate Commerce Commission, 31 M. C. C. 193; 34 M. C. C. 641.

QUESTIONS PRESENTED.

Intervener accepts or endorses the statement of questions presented, as well as the statement of jurisdiction and reference to statutes involved set forth in brief for appellees, the United States and the Interstate Commerce

Commission; and it adopts the summary of argument in the brief for appellees.

Intervener suggests, however, that the immediate or primary question before this Court is whether the decree and judgment of the statutory District Court should be affirmed, or whether there is merit in any of appellants' assignments of error.

The ultimate question is the validity of the assailed order of the Commission. On that question neither appellants nor appellees appear to have suggested to the Court that under the statute[1] the burden of proof was on the respondent motor carriers to justify the propriety of the proposed rates and minimums under suspension, a requirement of law which calls for examination of the testimony before the Commission to disclose whether there was such substantial evidence as required the Commission to hold that the proposed rates had been justified by respondents.

INTERVENTION.

The appearance of The National Industrial Traffic League as intervener[2] is under order of the Court, entered December 6, 1943, granting motion of intervention.

As recited in its motion, the League participated in the proceeding before the Commission and was interested in the subject matter of those proceedings, so that under the statute[3] it was entitled to appear as party in the suit in

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[1] Section 216(f), Motor Carrier Act, Part II, Interstate Commerce Act, Title 49, U.S.C., Sec. 316.

[2] Hereinafter for brevity referred to as the league, or as intervener.

[3] Title 28 U.S.C., Sec. 45a; Judicial Code Secs. 212-213, amended.

the court below. Unfortunately, the League had no notice of the proceedings in the District Court until after argument was had before the three judges and consequently did not appear in the Court below. The findings, decree and judgment are satisfactory to intervener; the League supports appellees in submitting that the appeal should be dismissed and the decree and judgment of the lower Court affirmed.

SUPPLEMENTAL STATEMENT OF FACTS.

Intervener adopts and reaffirms the statement of facts appearing in brief for appellees as both correct and complete, *excepting* these relatively minor additions:

a. In the proceedings before the Commission, there was substantial opposition from shipper interests to the proposed rates and minimum weights.[1] The brief of appellants unfortunately may convey an erroneous impression in the statement on page 3.

> "No shippers sought suspension of the operation of the new tariff schedules and none submitted evidence or took any part in the public hearing. When the full Commission reviewed the case it allowed a representative of Linoleum Manufacturers (not parties of the proceeding) the privilege of participating in the oral argument."

The full record in the Commission is not included in the printed transcript of record before this Court; in particular there is omitted the order of suspension and investigation, by which the Commission initiated the proceed-

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[1] While no shippers attended the hearing of this individual case (R. 49) the linoleum shippers and the League were active in the series of cases involving motor carrier minimums; and the League and linoleum manufacturers participated in the oral argument of this proceeding (R. 21-27).

ing, and the transcript of oral argument.[5] If these were included in the record before the Court, reference thereto would verify the objections and participation of linoleum manufacturers and of the League on behalf of shippers generally.

b. The suspended rates and minimums did not represent general changes by principal members of appellant associations but represented individual rates between certain points on behalf of certain motor carriers; and these were published in a schedule of their tariff publishing agent,[6] through an association arrangement. This fact is significant, bearing on appellants' objections to the Commission's report as based on *policy* instead of law and facts.

SUMMARY OF ARGUMENT.

1. The findings and conclusions of the Court below are amply supported by the record before the Court. The assailed order of the Interstate Commerce Commission was regularly made and entered, under an order of investigation, after full hearing, on an ample record of pertinent and material testimony. The order is not shown to have been invalid in substance or in law.

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[5] Ordinarily the transcript of oral arguments is not considered as part of the record in Commission proceedings; in this instance the oral argument is significant because of factual admissions of counsel and the light thrown on circumstances of this as a test case.

[6] The Commission suspended schedules filed by Agent Everett H. Russell from 14 eastern origins to 34 western destinations (R. 10), subject to minimum weights of 30,000 and a general classification-exceptions rating embodying a minimum of 20,000 (R. 10). Only one motor carrier indicated sufficient interest to offer any testimony (R. 53), and other member motor carriers were maintaining the lower rates on the 18,000 pound minimum (R. 59).

2. While appellants assail the Commission's decision as erroneously predicated on adoption of a policy, in fact the Commission simply stated doctrines and applied recognized rate-making principles, entirely within and in consonance with the national policy of transportation and the rate-making rule declared by the Congress.

3. It is essential to successful administration of the Interstate Commerce Act that there shall be continuity in the doctrines and rate-making principles observed by the carriers and applied by the Commission. The announcement of general principles and doctrines amounting to statements of administrative policy contravenes no duty and exceeds no limitation on the authority of the Commission. Such statements of rate-making "policy" are commonly sought by carriers and shippers. The objections of appellants to the supposed invalidity of the Commission's statements of policy in the assailed report reflects their disappointment that the Commission did not adopt a policy that suits the views and desires of appellant associations.

4. The doctrines and principles stated in the Commission's decisions are harmonious with long-established principles followed in regulating railroad rates and heretofore found by the Commission to be properly applicable to the facts and circumstances of highway transportation under Part III.

ARGUMENT.

I.

The decree should be affirmed.

The Court below had before it the text of the decisions and order (R. 20) of the Commission and the transcript of testimony upon which the Commission's decisions rested. (R. 49-65) Thereupon the Court entered four numbered findings (R. 39), reciting the status of the parties, describing the essence of the assailed decisions and holding that the order was entered after full hearing and adequate argument; that the Commission's findings were supported by substantial evidence and were adopted by the Court as its own.

Thereupon the Court below stated six conclusions of law (R. 40) to the general effect that the assailed order was justified by law and the evidence and constituted a valid exercise of the Commission's power to act; that the findings of the Commission were sufficient to sustain and warrant the order; that these findings were sustained by substantial evidence; that the construction of the law by the Commission was correct and that relief should be denied for want of equity.

There is in these findings and conclusions of the Court below no error or apparent misconception of law, or failure to consider the facts.[7] If this Court will examine

[7] There is no assignment of error as to facts; appellants' brief herein refers (p. 7) to "assignments of errors of law" only; and in appellants' statement of points relied on (R. 65) there is simply the unusual suggestion that the lower court's opinion "was not in any respect responsive to the contentions made by the appellants concerning the features of illegality" of the Commission's order.

the entire transcript of testimony received by the Commission (Rec. 49-65) intervener submits there will be discovered no basis for concluding that there was any lack of full hearing, any restriction on the opportunity of the respondent carriers to present any and all evidence they chose, and that the evidence offered falls far short of meeting any reasonable test of the burden of proof on respondent carriers to establish the propriety of the rates which the Commission had suspended. The opinion (R. 41), written by Hon. Augustus N. Hand, Circuit Judge, concurred in by District Judges Edward A. Conger and John W. Clancy, manifestly disposes of appellants' main theory and argument, although not mentioning refinements of reasoning in the ingenious presentation of plaintiff below The Commission's reports indicate no deviation from the substantive provisions of the statute, amounting to error of law.

Having in mind the doctrine applied by this Court that the judicial branch shall not substitute its judgment or discretion for that of the administrative tribunal[8] and in addition the support that this Court has given to the work of the Interstate Commerce Commission as an expert tribunal of enlightened judgment and experience, and with national vision,[9] this intervener suggests that nothing appears on the face of the record which would have warranted the Court below in holding that the Commission erred in striking down a tariff providing minimum weights to govern rates for transportation, 50 per cent higher than

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[8] *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658.

[9] *Standard Oil Co.* v. *United States*, 283 U. S. 235, 239; *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, 95; *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282.

the maximum legal load limit of the vehicles of respondents, as unreasonable and otherwise unlawful.[10]

Therefore, the decree and judgment of the District Court should be affirmed.

II.

The order is not based on a declared policy.

Examining somewhat carefully appellants' assignments of error (R. 45) and the statement of points relied upon by the appellants (R. 65) in the light of the brief offered by counsel in behalf of appellants, it appears that the Commission's decisions are attacked mainly as having been predicated on the adoption of a policy.[11] Appellants regard it as beyond the Commission's authority to decide cases on policy and, furthermore, regard the policy supposedly reflected in the assailed decisions as erroneous.[12]

While it is true there are expressions and announcement of policy in the decisions herein of Division 3 and the full Commission, yet as a matter of fact the Commis-

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[10] The formal findings of the Commission (R. 31) are buttressed by ample recitals of facts developed of record (R. 30) and the court below quite properly adopted as its own (R. 40) the findings of unreasonableness and unjust discrimination, as a whole, embodied in the Commission's report.

[11] The principal feature of argument in appellants' brief (p. 12) is entitled "The Commission's order is invalid because the conclusion of illegality was based only upon its own declared policy." See No. III of statement of points relied upon (R. 66).

[12] Appellants' true object seems to be the following of a policy by the Commission of permitting motor carriers to adopt railroad freight rates, as such; asserting as a proposition of law that motor carriers, when meeting a subnormal railroad rate, may attach the same incidents of minimum weight requirements as attached to the railroad rate.

sion simply stated doctrines and applied recognized rate-making principles which are entirely within and in consonance with the national policy of transportation as declared by the Congress.

If the decision is examined not as a test case but more narrowly as to the validity of the order itself (R. 20), requiring cancellation of the proposed or suspended schedules, it will be discovered very quickly that there was no substantial evidence which would have justified any different order. For under the facts shown by the evidence the proposed minimum was plainly unreasonable and creative of unjust prejudice. At least, it was clearly within the administrative judgment of the Commission so to determine upon the facts, which is just what Division 3 did in the first decision, 31 M.C.C. 193. (R. 20)

WHY THE COMMISSION EXPRESSED A POLICY.

The question is natural, why did the Commission use the words "we shall follow the policy" and "we adopt as a policy" instead of merely restating a principle theretofore stated? The answer is that they were in fact responding to requests for making clear and final the principle, or policy, to be followed in considering minimum weights of motor carriers, and such requests were as much from the motor carriers as from shippers.

Indeed, it seems that appellants are not entirely candid when attacking the decision on the ground of announcement of policy by the Commission as controlling circumstance, because in essence it was the appellants themselves who were seeking an expression in this test case of such policy. To give the Commission the benefit of the circumstances under which it applied its expert knowledge and enlightened judgment, to consider what prompted its ex-

pression of a settled policy, the Court should have in mind matters of history that are not reflected in the record submitted by appellants as constituting the printed transcript. Confessing that counsel for intervener should not go outside the printed record for facts determinative of this proceeding, yet it is entirely fair to invite the Court's attention to these circumstances:

APPELLANTS SOUGHT A TEST CASE.

Under date of February 27, 1942, the three associations or carrier bureaus, appellants herein, including five others, joined in presenting printed petition to the Commission for reargument and reconsideration of eleven cases theretofore decided by Divisions 2 and 3 of the Commission, including the case presently involved—I. & S. M-1216. The gravamen of this petition was that the Divisions had been deciding cases involving "minimum weights exceeding the legal carrying capacity of the vehicles ordinarily used" along lines detrimental to the trucking interests and unsatisfactory to said petition, wherefore a general argument of the cases should be had.[13] Quite obviously the end sought was the determination of a principle or enunciation of a doctrine, amounting to a statement of policy, within the terms of the national transportation policy declared by the Congress and in line with the substantive provisions of the Act. The petition was rejected by the Commission on April 6, 1942, on the ground that the petitioners were not parties of record to all of the proceedings, and many of the grounds relied upon were not matters of record in the proceedings. Coincidently, and as part of

[13] This petition is reported in *I.C.C. Practitioners Journal* for March, 1942, Vol. IX, No. 6, p. 604, as item 1, with comments by Mr. J. Ninian Beall, who was of counsel for appellants before the Commission herein.

the same action, the Commission reopened the present proceeding, I. & S. M-1216, (being one of the proceedings included in said petition) for oral argument on May 8, 1942. This patently was the making of a test case to afford opportunity for a statement of principle, announcement of doctrine, or policy, responsive to the urgings of the motor carrier associations or bureaus, who are appellants herein.

Parenthetically, the prior decisions in which the Division had established the principle regarded by the motor carrier associations as unsatisfactory and listed in appendix to their aforesaid petition were as follows:

Iron and Steel from Pittsburgh and Aliquippa, Pa. to Baltimore, Md., 21 M.C.C. 791.
Carpets and Carpeting from Official Territory, 237 I.C.C. 651.
Whiskey from Cincinnati, 22 M.C.C. 81.
Peanut Butter from Montgomery, 22 M.C.C. 375.
Paper, Mechanics Falls, to Boston, 28 M.C.C. 196.
Petroleum Products, Bolivar, N. Y., to Farmer's Valley, 28 M.C.C. 527.
Beans, Billings, Mont., to South Dakota, 30 M.C.C. 125.
Seeds, Montana, Iowa, Minnesota and Wisconsin, 30 M.C.C. 547.
Rugs and Matting, East to Western Trunk Line Territory, 31 M.C.C. 193,
Activated Carbon, etc., Texas to Kansas City, 31 M.C.C. 697.

The aforesaid petition and the orders are not parts of the printed transcript of record before this Court, but the circumstances are not to be controverted and should be considered as throwing light on the third ground urged by appellants (R. 66) and the argument made under corresponding subject A of argument in the brief for appellants (p. 12) that "the Commission's order is invalid because the conclusion of illegality was based only on its own declared 'policy'".

THE POWER TO DETERMINE POLICY.

Broadly speaking, this intervener admits that the Commission is without power to determine national or legislative policy.[14] The carriers are entitled to initiate rates and adopt such policies of rate-making as to them seem wise, without substitution of a policy dictated for them by the Commission.[15] But this is not to admit what seems to be appellant's view, that (within the substantive rules laid down and the national policy declared by the Congress in the Interstate Commerce Act and any supplemental legislation) the Commission is without power to announce its policies of administration, in terms amounting to nothing more than the statements of rate-making principles and detailed doctrines.

The words of announcement of a policy found in the present decisions amount to no more than such definite expression of a doctrine and principle, entirely within the Congressional declaration of national policy and rate-making rule.[16]

Intervener does not differ at all with Mr. Commis-

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[14] *Cincinnati, New Orleans & Texas Pacific* v. *Interstate Commerce Commission*, 162 U. S. 184; *Central R. Co.* v. *United States*, 257 U. S. 247.

[15] *Interstate Commerce Commission* v. *Chicago Great Western*, 209 U. S. 168; *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433; *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515.

[16] The rate-making rule expressed in Section 216 (i) contemplates that the Commission shall give consideration, among other factors, to the inherent advantages of transportation by the particular carriers, to the effect of rates upon the traffic of such carriers and to their revenue needs. The declaration of national policy forms a preamble to the Interstate Commerce Act; title 49 U. S. Code, Secs. 27, 301 and 901.

sioner Lee in his statement of dissent in the final decision (R. 32) to the effect:

> "The determination by us of whether a motor carrier rate, or the minimum to which it is subject, is unreasonable or unjustly discriminatory must be based not upon the application of an arbitrary policy, but upon careful consideration of all the circumstances and conditions shown to affect the transportation."

And there is no reasonable implication that the report of the Commission offends that thought, for the decision indicates the transportation facts which were considered and the expression of policy amounts to no more than a definite statement of settled opinion of principle and doctrine. We are thinking of the ordinary dictionary definitions: *Doctrine*, is a principle or position or a body of principles; *Principle*, is a fundamental law or doctrine from which others are derived or on which others are founded, a general truth, a settled rule of action; *Policy*, is a settled or definite course or method followed by a government, institution, person or individual.

That the appellants themselves were seeking from the Commission what amounted to an administrative declaration of rate-policy, further, what the appellants regard as the true policy, is indicated by this short quotation from the argument of counsel (Mr. Cotterill) before the Commission in the underlying case as recorded on p. 35 of the typewritten transcript:

> "Division 3 announced the conclusion that the suspended rates were unlawful because unreasonably involving a minimum weight greater than the loading involved, and accompanied that by an announcement that, as a matter of policy, henceforth such would be the view of this Commission in any similar situation, and in substance, saying that it was consistent with a series of decisions by Divisions 2 and 3 of general like import although varying somewhat in the attributed reasons in the findings of illegality.
>
> "Now, the motor carrier industry is here urging your

Honors to look at the situation differently, as a full Commission, and we rest our case on a proposition of law essentially which is that motor carriers, when lawfully meeting a subnormal railroad rate, may attach to their rate the same incidents as are attached to the railroad rate in the matter of the minimum weight requirement."

III.

The desirability of established doctrines.

While perhaps going beyond the scope of necessary argument in this case, we presume it will be recognized that it is essential to successful administration of the Interstate Commerce Act that there shall be pronouncements of principles of rate-making and rate determination by the Commission whereby carriers and shippers alike may be governed so that there shall be some continuity of decisions and of application of principles and carriers may know what is to be regarded as proper measures and tests of validity, fairness and reasonableness.

For instance, under Part I governing railroads the principle has long been recognized that car-mile earnings afford sounder and more satisfactory test of the reasonableness of carload rates than is afforded by ton-mile earnings thereon.[17] When the Commission announces that principle with finality it is in a sense stating its policy; and such statements of policy ordinarily are unchallenged, so far as any claim that such lie beyond the authority of the Commission.

The difference is very great between declarations by

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[17] *Luten Bridge Co.* v. *Atlantic Coast Line R. Co.*, 123 I.C.C. 612; *Interstate Amiesite Co.* v. *Akron C. & Y. Ry. Co.*, 173 I.C.C. 456; *Piedmont Corp.* v. *G. & N. W. R. Co.*, 153 I.C.C. 751; *United States Graphite Co.* v. *B. & O. R. Co.*, 169 I.C.C. 518.

the Commission as to matters of national policy and substantive principles of law, (properly reserved to the Congress and beyond any proper function of the Commission), on the one hand, and those statements of rules of conduct, so to speak, reflecting merely detailed principles of rate making and of rate determination, which the Congress has left to the Commission.

Appellants rely strongly on the language used by Mr. Justice Black in his dissenting expression in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, decided June 14, 1943. That was a situation where it seemed Congress had declared the national policy favorable to water transportation and that the Commission was seeking to adopt a policy of its own not in harmony with the Congressional declaration.

Intervener will go the appellants one better by citing the decision in *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 86 Law ed. Adv. 627. While we find no precise language therein amounting to denial of right of the Commission to express its policy, the decision as a whole plainly condemns the Commission's action in the particular case as having been pursuant to an adopted policy of the Commission. Such policy related to regulation of common and contract carriers and involved applying tests in conflict with those provided in the statute. No policy of the Commission, of course, can infringe upon or go beyond the principles, powers, and provisions of Congressional enactments.

The fact remains that Congress has broadly legislated in Sections 1 and 216 of the Act, for illustration, to the effect that all rates and charges shall be just and reasonable. It has not undertaken to define or state the proper principles of transportation rate making or the circum-

stances and factors to be employed in carrying out the mandate that the Commission shall strike down any rate which is unreasonable. Such details of principle and rate-making doctrines it is certainly desirable shall be set forth in Commission decisions which, when consistently followed amount to adopted policies.

IV.

The doctrines stated and principles applied by the Commission.

The principle and doctrine especially stated by the Commission and assailed by appellants is that a minimum weight to govern truckload rates of motor carriers and which exceeds the physical and legal limits of capacity of the trucks used is to be regarded as unreasonable in the absence of showing of operating economies. This does not purport to be a rule of law; it is stated as a matter of adopted policy in the following paragraph of the first decision, by Division 3 (R. 18):

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum We adopt as a policy the condemnation as unreasonable of

> a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The foregoing paragraph from the report of Division 3 was quoted and reaffirmed in the final decision by the full Commission (R. 23) and therein the full Commission made the following further statement (R. 29):

> We are mindful of the fact that we approved certain rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra*. However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, but that for the future we shall follow the policy announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

The foregoing statements are embodied in the opinion by Judge Hand (R. 41). Each of the statements of principle and each of the conclusions stated in these paragraphs is correct and is in accordance with repeated rulings of the Commission in prior cases.

In substantiation of these assertions, intervener now brings to the Court's attention various decisions of the Commission stating principles to be applied in measuring

proper truckload minimums, *i. e.*, the specified least quantity which a shipper must tender through the motor carrier before it is entitled to a lower rate than that fixed for single package or less-than-truckload shipments (R. 29, lines 26-30).

ESTABLISHED PRINCIPLES GOVERNING TRUCKLOAD MINIMUMS.

That there is nothing really new or revolutionary or surprising in the doctrine announced in the assailed reports of Division 3 and the full Commission herein, will be readily seen from a review of numerous previous decisions of the Commission and divisions thereof.[18]

In *Coal from Wyoming to Idaho Falls, etc.*, 29 M.C.C. 335, Division 2, disapproved coal rates proposed by motor common carriers subject to minimum weights of 100,000 or 200,00 pounds, reflecting a situation of railroad competition. It prescribed a minimum weight of 20,000 pounds and in reaching its conclusion said:

> "It is a common practice for carriers to assure themselves adequate revenue by requiring a minimum weight in connection with a particular rate. We have often found minimum weights of rail carriers to be unreasonable when in excess of the loading capacity of the vehicle. Obviously, most of the minimum weights shown in this record and set forth in the appendix hereto are in excess of the loading capacities of the vehicles used, and they presumably are applied in connection with several shipments rather than a single one. This record contains no evidence from a cost, transportation, or other standpoint tending to justify a lower rate per unit on several truckloads than on a single truckload. It is clear that the effect is to prefer unduly the large shipper. Such minimum weights are also unreasonable and result in unjust discrimination."

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[18] These decisions were reviewed in brief filed by this intervener with the Commission.

In *Iron and Steel from Pittsburgh and Aliquippa to Baltimore*, 21 M.C.C. 791, Division 3, condemned suspended schedules carrying minimum weights for motor carriers reflecting the carload rate basis of the railroads (which the Commission had fixed in the *Iron and Steel* case, 155 I.C.C. 517), and in reaching its conclusion said:

> "A truckload minimum weight is generally understood to be the quantity which a carrier can transport in a single vehicle, *Stoves-Alabama and Tennessee-Interstate Points*, 4 M. C. C. 641. Motor carriers should not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. *New England Motor Carrier Rates*, 21 M. C. C. 373."

In *Paper from Mechanic Falls to Boston*, 28 M.C.C. 196, Division 2, quoted with approval *Iron and Steel from Pittsburgh and Aliquippa*, *supra*, and condemned proposed truckload minimum weight of 40,000 pounds to govern reduced commodity rates on printing, wrapping, and newsprint paper.

In deciding the series of general *Ex Parte* MC cases[19] in which it endeavored to aid the motor carrier organizations to bring order out of chaos in the general rate structures throughout the various territories east of the Rocky Mountains, Division 5 (Commissioners Eastman, Lee and Rogers) has affirmatively applied the general doctrine that the weights governing minimum rates of motor carriers should be made with regard to the physical conditions of the transportation, especially truck loading capacity and highway limitations. In that group of cases, we find two expressions in *Truck Line Territory Motor Carrier Rates*,

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[19] Motor Carrier Rates in Middle Atlantic States, 4 M.C.C. 68; Central Territory Motor Carrier Rates, 8 M.C.C. 233; Motor Carrier Rates in New England, 8 M.C.C. 287; Trunk Line Territory Motor Carrier Rates, 24 M.C.C. 501.

24 M.C.C. 501, which are in point. First, on p. 578 thereof in discussing *linoleum cement*, the Division said:

> "* * * With respect to the rates proposed subject to a minimum of 36,000 pounds, we have said that minimum weights in excess of the average carrying capacity of equipment now in use is not conducive to economical operation. The proposed rates are not approved."

Second, in connection with truckload commodity rates on *desiccated coconut* the Division said on p. 582:

> "No justification or necessity was offered for the establishment of the less-than-truckload commodity rates or a truckload commodity rate subject to a minimum weight in excess of the carrying capacity of equipment now in use by the majority of carriers. In view of the foregoing, the proposed rates are not approved."

It is true there have been some expressions of the Commission which the organizations of motor carriers have cited as lending support to their proposals of adopting rail carload minimums, as such, to govern truckload rates. The two cases which are cited in the report of Division 3 herein (R. 17 and R. 18), as stressed by respondents in that behalf, are not at all determinative of the principle or policy to govern in such matters but rather illustrative of possible exceptions to what should be the general rule.

First, in *Peanut Butter from Montgomery to Georgia*, 22 M.C.C. 375, Division 2 said at p. 377:

> "Motor carriers should not maintain truckload or volume rates subject to minimum weights greater than they are able to transport in the equipment which they generally have available. There are numerous motor-carrier rates subject to volume minimum weights which exceed the amount which can be transported in the trucks generally used for the transportation of the commodities on which these rates apply. The national motor-freight classification is replete with ratings subject to minimum weights of 40,000, 50,000, and 60,000 pounds. In most States, restrictive

laws prevent the transportation by motor carriers of loads as heavy as 20 to 30 tons in single units of equipment. We have not condemned the minimum weights of motor carriers which can only be transported in more than one vehicle. * * *"

The Division approved a minimum weight of 12,000 pounds on peanut butter as not unlawful, in lieu of previous volume rate subject to minimum weight of 36,000 pounds.

The second case which was cited by counsel for respondent carriers in the underlying proceedings before the Commission in the present matter (R. 17) is the report of the Commission in *Carpets and Carpeting from Official to Southern Territory*, 237 I.C.C. 651. Commissioner Mahaffie filed with that report this laconic expression, p. 658:

> "I concur, except that I find no justification for basing rates on a truck minimum that admittedly cannot be loaded in a truck."

The main decision, written by Commissioner Rogers, dealt with the relationship between the railroad rates and the motor carrier rates and definitely approved a minimum greater than could be loaded on one unit of equipment, 30,000 pounds. This, however, represents a specific action on a particularly isolated item and was with distinct reservation as to the principle, for the Commission said (our italics):

> "*We are not convinced that it would be reasonable* for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, *we are not prepared to say* that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, *would be unlawful*, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading."

The twelfth supplemental report in the general proceeding, *Trunk Line Territory Motor Carrier Rates*, 31 M.C.C. 541, decided January 2, 1942, is illuminating. This modifies the comprehensive minimum rate order entered under the original report, 24 M.C.C. 501, as to some 32 commodity rate items. The new rates apparently represented a parity with competitive railroad rates and there was no recorded opposition to the petition. But the minimum weights approved are lower than the carload weights maintained by the rail carriers, although the motor carrier conference sought approval of volume minimum weights the same as the rail carload minimum weights. The report recites:

> "• • • It is admitted that the proposed minima cannot be transported in one vehicle, and the earnings shown in support of the proposed rates are based on minima of 20,000, 23,000, and 30,000 pounds, weights which are generally capable of being loaded in one vehicle."

Thereupon, Division 5 said in its aforesaid report of January 2, 1942, denying the higher minimum weights:

> "In prior reports herein we have generally approved proposed truckload rates which are the same as, or higher than, the corresponding rail carload rates provided the proposed rates appeared above a reasonable minimum level, although the proposed truckload minimum weights were lower than the corresponding rail carload minimum weights. In other proceedings we have generally held that motor carriers should not maintain minimum weights greater than those which can be loaded in their vehicles. The rates sought, subject to minimum weights which we believe can be loaded in respondents', vehicles, appear to be reasonably compensatory. They are approved subject to such minimum weights."

In the eleventh supplemental report in *New England Motor Carrier Rates*, 21 M.C.C. 373, at p. 396, old Division 5 said:

> "• • • We are of the opinion that motor carriers should

not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. See our original report herein, 8 M. C. C. 287."

On page 384 of the same supplemental report, old Division 5 substituted minimum of 20,000 pounds for proposed minimum of 36,000 pounds on *printing ink*, and said:

"• • • A Motor-carrier witness testified that none of its vehicles could carry the proposed minimum of 36,000 pounds, and that only a small percentage of its equipment could carry as much as 24,000 pounds. The establishment of a minimum weight by a carrier which exceeds the average capacity of its equipment is of doubtful propriety."

On page 396 of the same supplemental report, the Division disallowed minimum weight of 36,000 pounds of *soap and related articles*, and said:

"• • • However, petitioner's witness testified that 36,000 pounds of these commodities could not be transported in one vehicle of the capacity generally used in over-the-road movements. We are of the opinion that motor carriers should not establish minimum weights which exceed the capacity of the equipment ordinarily used in their transportation. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. See our original report herein, 8 M. C. C. 287."

Later, in the fifteenth supplemental report in the same proceeding, 24 M.C.C. 213, at page 222, in discussing the commodity rates on *latex*, Division 5 said:

"The traffic moved by motor vehicle in 20,000-pound to 22,000-pound shipments, and one motor carrier transported from three to four truckload shipments per week. The maximum-weight laws of the States through which the latex would be carried do not permit the transportation of 40,000 pounds of this article in one vehicle. Ten-ton trucks are the largest generally used in the treated territory by common carriers of general commodities. As we have stated in prior reports herein, minimum truckload weights of mo-

> tor common carriers should not ordinarily exceed the capacity of the equipment generally used in their transportation."

The foregoing decisions dealing with minimums governing motor carrier movements are in general harmony with the principles considered in judging rail carload minimum weights, as will be seen by examination of the reported decisions.

ESTABLISHED PRINCIPLES GOVERNING RAIL CARLOAD MINIMUMS.

The report of Division 3 defines the conditions governing carload minimum weights of railroads by saying the Commission has found repeatedly these should be made "with reference to the loading capacity of their freight cars," and that "minimum weights in excess of the loading possibilities of the rail equipment" have been condemned. (R. 19)

In the later decision by the full Commission, appears this statement (R. 29):

> "The rates and carload minimum weights of rail carriers are fixed with relation to conditions surrounding transportation in rail service. The primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment. Except in unusual circumstances, such as those presented in the *Molasses case*, minima in excess of the weight which can be loaded in a single car have been condemned."

Examination of the long line of Commission decisions interpreting and applying the Interstate Commerce Act, clearly establishes that it is the duty of the railroads to provide carload minimum weights that are reasonable: that there is naturally a close relationship between the carload minimum weight and the carload rate: that the

minimum weights are and should be fixed in relation to the loading characteristics of the commodity, with some regard to commercial considerations; that in the interest of economical transportation the minimum on carload freight may be as high as the product can be safely and advantageously loaded, considering both the capacity of the car and the needs of the traffic. It has been repeatedly recognized that carload weight minimums may be approved or required which are far below the physical capacity of the cars but dictated by commercial conditions and the needs of the traffic. But the converse has not been held, that carload minimum weights may properly be fixed higher than the loadings permitted by the capacities of the cars.

As to railroad carload traffic, there is a very long line of cases that charges on basis of a minimum weight which cannot be loaded into the car furnished by the carrier shall be condemned and that the carriers should not be permitted to provide arbitrary minimum weights which cannot be loaded in ordinary equipment available for transportation.

In other words, as to railroad transportation, the Commission's rate policy is clearly established that the ceiling for carload minimum weights shall be determined with reference to the loading capacity of the freight cars and that minimum weights are to be condemned which are in excess of the loading possibilities of the rail equipment.[20]

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[20] *J. Rosenbaum Grain Co.* v. *Missouri, K. & T. Ry. Co.*, 15 I. C. C. 499; *Ozark Fruit Growers Assn.* v. *St. Louis & S. F. R. Co.*, 16 I. C. C. 106; *Barnard Co.* v. *C. M. & St. P. Ry. Co.*, 26 I. C. C. 91, 93; *New England Milk Case*, 40 I. C. C. 699; *Arizona Copper Co.* v. *Director General*, 73 I. C. C. 287; *Portland Flouring Mills Co.* v. *N. P. Ry. Co.*, 83 I. C. C. 366; *Wool Rates Investigation*, 1923, 91 I. C. C. 235; *Hollingshead Co* v. *A. A. R. R. Co.*, 140 I. C. C. 497.

It has been said that minimum weights are placed at a figure that will best serve the general public and at the same time insure economical use of equipment, and that they should only be disturbed on a clear showing that they are unsuitable to the particular commodity and generally unsatisfactory to the shipping public as a whole. *United Verde Copper Company* v. *A., T. & S. F. Ry. Co.*, 142 I.C.C. 315.

It has been repeatedly held, as a controlling general principle, that while minimum weights should be high enough to insure a proper utilization of equipment, they should not exceed what can be reasonably and generally loaded. To this has been attached the interesting rider that some leeway should be accorded for commercial conditions, in fixing carload minima, and that the minima fixed should not contemplate or require the loading of all cars to their utmost capacity.[21]

ANALOGY OF VOLUME TRUCK RATES TO TRAINLOAD RAIL RATES.

It has been urged—and the Commission's decision adverts to that argument—that there is a certain analogy between the carrier proposals in the present case and the principles of volume rates reflected in railroad rates limited to *trainload* movements. That analogy, when fully considered, in the light of the Commission's treatment of the subject of trainload rates, furnishes additional reason for condemning the contention herein of the trucking interests for high minimum weights by way of adopting the so-called competitive carload minimums of the railroads.

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[21] *Lumber Carload Minima*, 68 I. C. C. 98; *Minimum Weights on Coal-tar Paving Cement*, 81 I. C. C. 672; *Aluminum Goods Mfg. Co.* v. *A. & V. Ry. Co.*, 92 I. C. C. 346; *Heinz Co.* v. *Director General*, 112 I. C. C. 206; *Theater Chairs to Southwestern Destinations*, 113 I. C. C. 313.

There was considerable discussion during the oral argument[22] before the Commission on May 8, 1943, of the decision in *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I.C.C. 485, in which the full Commission authorized trainload rates to Peoria and Pekin on blackstrap molasses, minimum 1,800 tons or equivalent to 38½ tank carloads. The recitals of this decision clearly indicate its landmark character in overturning, or at least modifying doctrines and precedents of many years' standing. In truth, the Commission was reluctant to yield to compulsion of the facts of competition to approve the trainload rates involved and did so only upon clear showing of real competition, absence of any resulting unjust discrimination in reality, and clearest proof of very substantial economies in trainload movements between the particular points which would justify lower than carload rates.

Superficially, and only superficially, the report in that case might be thought to afford some comfort for the proponents of the so-called truckload rates based on carload minimums involved in this present case, representing adoption by motor carriers of weight limits correspondingly in force on railroads, just as the blackstrap case involved adoption by railroads of the weight minimum reflecting actual water competition. Such superficial impression is readily rejected when one reads the full terms of the majority report and particularly the expressions of the concurring and dissenting Commissioners. The opening sentence of the *conclusions*, p. 502, might be selected by motor carrier counsel as in support of their proposition:

"We find that there is nothing unlawful in the estab-

[22] This discussion is in part reflected in the recitals of the final decision subsequently entered by the Commission, pages 644, 646, R. 27, 30), where the Commission points out the error in the interpretation placed by motor carrier counsel on the *Molasses case* decision.

> lishment of railroad rates on a quantity larger than a car load, when moving as a single shipment, where, as here, they are designed to meet competition from other modes of transport whose unit of transportation is not limited to single carloads, provided a just and reasonable relation in rates as between the larger and smaller quantities of the same traffic is maintained. * * *"

But the *recitals of fact* in the body of the report very definitely distinguish that conclusion from the proper conclusion reached by Division 3 in the present matter; and this the more clearly appears from the concurring opinion of then Chairman Eastman:

> "* * * The record also shows clearly that the railroads can move molasses between the same points in multiple-carload quantities of not less than 1,800 tons at a materially lower cost per 100 pounds than they can move single carloads. The question at issue is whether it is lawful for them to make rates which reflect this inherent advantage in volume shipments in order to complete more effectively and profitably with the existing water transportation. In my judgment it is lawful. * * *"

It would be impossible to suggest (on the record made before the Commission in the present case) that the respondent motor carriers were proposing these linoleum rates governed by railroad carload minima of 30,000 pounds on any facts which even remotely reflect any "inherent advantage in volume shipments," or that the traffic in 30,000 pound lots will move "at a materially lower cost per 100 pounds than they can move single *truckloads*," of 18,000 or 22,000 pounds, substituting the word *truckloads* in this last clause for the word *carloads* in Mr. Eastman's sentence.[23]

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[23] No claim has been made on behalf of respondent motor carriers of any lesser costs or substantial savings in transportation of linoleum in 30,000 pound quantities, as contrasted with lots representing full loading of the trucks.

The dissenting expression of Commissioner Porter, in which Commissioner Lee joined reviewed outstanding cases in which the Commission established "ancient landmarks," protective of the integrity of the whole rate structure for the benefit of ordinary shippers by denying quantity rates which only large shippers or selected communities might really enjoy. That decision certainly supports in basic theory the policy outlined by the Commission in this case as to motor rate matters.

The decision in the trainload blackstrap case was mentioned (as somewhat analogous to motor carrier proposals of adopting carload minimums) in the decision of Division 3, in *Petroleum Products from Bolivar*, to Farmers Valley, 28 M.C.C. 527. At p. 529 the Division said:

> "* * * The rate approved in that proceeding, however, applies on a single consignment of about 38 carloads, tendered to the rail carrier at one time, on one bill of lading, to be transported at one time in a single train. Because of this manner of handling, it was shown that the operating cost per 100 pounds to the rail line is much less than when the commodity is transported in single carloads. No such showing was made herein. The record, on the contrary, indicates that the respondents' cost of operation would be same whether the wax distillate moved in single or multiple truckloads. No good reason appears, therefore, for the establishment of a multiple-truckload minimum weight, and we conclude that the question whether the proposed minimum rate would be lawful should be determined on basis of a truckload minimum of 4,000 gallons."

In that decision proposed minimum of 50,000 gallons per shipment was disapproved, although designed for application by a contract motor carrier.

An interesting and illuminating article by Mr. Elmer A. Smith[24] entitled "A New Price Policy for the Railroads:

[24] The author of this article is Senior General Attorney for the Illinois Central Railroad who conducted the *Molasses case* for the carriers.

Quantity or Multiple-Car Rates," appeared in *I.C.C. Practitioners' Journal* for September, 1940. The author discussed the policy reflected in the blackstrap trainload rate case and the historical background. The opening paragraphs of that article (supported by adequate footnote references, not necessary to reproduce), throws further light on the question we are now discusssing (our italics):

> "When the Interstate Commerce Commission came into existence in 1887, it found that the railroads commonly accorded lower rates to commodities moving in carload lots than to commodities moving in less-than-carload lots. It was even argued in some early cases that any difference in the charges between these two units of shipment resulted in a violation of Section 2 of the Interstate Commerce Act, which prohibits unjust discrimination. *The Commission made it clear,* however, in approving the principle of a lower rate on a carload shipment, that it was not granting any vague concessions to quantity transport, but was *simply according recognition to marked differences in costs* between two sharply distinguishable modes of transport.
>
> "But, although the Commission thus approved the principle that, *because of differences in the cost of service,* rates might properly be lower on carload than on less-than-carload shipments, the Commission set its face in the first year of its existence against the practice of the railroads, then a rather common one, of making lower rates to those who shipped in quantity lots greater than a carload than to those who shipped a carload only of the same commodity. The Commission, in short, refused to approve what may be described as wholesale rates."

In other words, this leading railroad exponent of a new price policy—a new rate-making policy—recognizes in the beginning that there must be marked differences in costs to justify any *wholesale* rates. That element is not present, according to the evidence, in the present case and in the absence of any demonstrated economy, we submit that the Commission is within the law when it holds there should be no approval of volume rates, labelled "truckload" rates, subject to arbitrary minimum weights based on the carload minimums adopted by the competitive mode of transportation, the railroads.

ABSENCE OF VALID REASONS FOR MINIMUM WEIGHT EXCEEDING TRUCK CAPACITY.

The second point in the conclusions of Division 3, quoted above[25] from p. 201 of the report (R. 19), is:

> "The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists."

The soundness of this expression is unquestionable in the light of the numerous decisions to which we have referred above, relating, first to the established principles governing truckload minimums; second, the principles which have been observed in dealing with carload minimum weights of railroads, and, third, by clear analogy to the situation as regards volume rates of railroads, *i. e.*, trainload rates, as exemplified by the *Blackstrap Molasses case, supra.*

In fact, there is not any evidence whatever in this record of any economical feature to justify a lower rate on 30,000 pounds than on the 20,000 pound lot, and there is every implication and assumption of exactly opposite effect. This is accentuated by the fact that the proposed note requiring actual receipt of 30,000 pounds at one time would seem to throw a burden or duty on the initial carrier, which would add substantially to the comparative expense of handling 30,000 pounds on two trucks versus a single lot of 20,000 pounds which could be and would be handled on a single truck, in pick-up service.

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[25] Page 16 *supra.*

THE CONDEMNED 30,000 POUND MINIMUM WAS A VOLUME MINIMUM.

The third sentence of the conclusions previously quoted[26] from p. 201 of the decision (R. 19) reads:

> "Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum."

This sentence inescapably is correct. It was required by the facts established of record and it was dictated by a common sense interpretation of those facts.

THE REPEATED DECISIONS CONCERNING MINIMA CONSTITUTE AN ESTABLISHED DOCTRINE.

In considering the validity of the announcement by the Commission in the orders under review as to the policy which it will follow, intervener suggests the importance to be attached to the foregoing survey of the numerous cases in which the same practical question has been involved.

In case after case wherein the Commission was considering the propriety of motor carrier rates subject to minimum weights higher than any single vehicles could carry, it has gained an experience and acquired knowledge of circumstances, conditions, and proper theories. In repeatedly announcing the doctrine as to volume rates and minimum weights thereon, the rule has become so well established as to become appropriate for adherence in all ordinary similar matters. Accordingly it seems proper that this should be stated and announced as the administrative or rate-making policy, within the Congressional declaration of national policy and entirely in accordance with the rate-making rule laid down in Section 216 (i) of the Act.

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[26] Page 16 *supra*.

CONCLUSION.

Intervener joins in the conclusion expressed in the brief of appellees that the decree and judgment of the District Court should be affirmed.

Chicago, Illinois, December 10, 1943.

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SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1943.

Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carriers Conference, Inc., et al., Appellants,
vs.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Southern District of New York.

[February 7, 1944.]

Mr. Justice Rutledge delivered the opinion of the Court.

Appellants are motor carrier associations who seek to put into effect proposed rate schedules in order to meet rail competition. The schedules cover transportation of hard surface floor covering, e. g., linoleum, from points in New England and Middle Atlantic states to various destinations in Middle Western states. The Interstate Commerce Commission, three Commissioners dissenting, rejected the schedules. 34 M. C. C. 641. In so doing it upheld the previous conclusion of its Division 3. 31 M. C. C. 193. A three-judge District Court (28 U. S. C. § 47) sustained the Commission's decision. 48 F. Supp. 432. The appeal, under 28 U. S. C. §§ 47a, 345, brings the decree here for review. Eastern-Central is the principal appellant. We think the judgment must be reversed.

When the schedules were filed, the motor carriers' rates on carpeting generally were based on minimum weights varying between 16,000 and 20,000 pounds, roughly approximating a truckload. Below this weight the rate was equivalent to 70 per cent of first class. Above it the rate varied somewhat, in the neighborhood of 45 to 50 per cent of first class. Corresponding rail rates then were 70 per cent of first class for shipments of less than 30,000 pounds (less than carload lots) and 45 per cent for larger shipments. Thus, the differential according to weight was geared in the one case to rail carload capacity and in the other to truckload capacity.[1]

[1] So it was found, in each instance, upon the evidence, and the finding is not disputed. The figures are only approximate; that is, 30,000 pounds represents not an exact carload capacity, since differences in loading characteristics

Conceiving that these structures gave the railroads an undue competitive advantage on larger shipments, appellants proposed specific rates designed to enable them to compete with the railroads for such shipments. They sought to utilize a new minimum weight. The rates tendered were approximately the equivalent of 70 per cent of first class for shipments of less than 20,000 pounds, 47.5 per cent for 20,000 to 30,000 pounds, and 45 per cent for 30,000 pounds or more. The schedules therefore substantially put rail and motor rates on the same plane for less than 20,000 and more than 30,000 pounds; but placed motor rates substantially lower than rail rates for shipments of 20,000 to 30,000 pounds.

Certain western rail carriers protested. Thereupon the proposed rates were made the subject of investigation and suspension proceedings. 49 U. S. C. § 316(d), (g), 49 Stat. 558-560, 54 Stat. 924. Hearings were begun before Division 3. While they were pending appellants agreed to make applicable in connection with their proposed rate, minimum 30,000 pounds, a tariff provision that such shipments "must be received at and transported from the point of origin from one shipper in one day and on one bill of lading."[2] The rail protestants therefore presented no evidence and after the hearing withdrew their protest. While the proceedings were pending the rail carriers also reduced their rates minimum 30,000 pounds to 42.5 per cent of first class.

The hearings continued and appellants presented evidence which showed, among other things, that one motor carrier, Brady Transfer and Storage Company, of Fort Dodge, Iowa, had received "since these rates were suspended, four loads from the Western Trunk Line Territory, instead of 398, and three of those we haven't collected the charges on, because the rate was too high . . ." It appeared too that the eastbound movement consists largely of dairy products, requiring refrigeration. The bulk of the westbound movement is frozen or salted fish.

Division 3 made findings and conclusions first that, based upon the costs proven and comparison with motor carriers' rates on

of commodities and slight differences in carload capacities may make possible loading slightly more or less in a car. Similar, perhaps somewhat wider, variations affect trucks. The findings were that 20,000 pounds reasonably can be viewed as a minimum weight geared to truckload capacity, though in some instances as much as 22,000 or 25,000 pounds actually can be loaded in one vehicle.

[2] Cf. Carpets and Carpeting from Official to Southern Territory, 237 I. C. C. 651; Peanut Butter from Montgomery, Ala., to Georgia, 22 M. C. C. 375.

numerous commodities, the proposed rates 45 per cent were "just and reasonable provided the minimum that is applicable in connection therewith is reasonable." Accordingly it examined the reasons advanced in support of the proposed minimum of 30,000 pounds.

On this, it found in No. M-1445[3] that linoleum shipments which move by rail to the Ohio points generally are consigned to warehouses having rail sidings, while linoleum is tendered to the appellant motor carriers in quantities weighing from 18,000 pounds upward. It found also, and the finding is not questioned, that it is physically impossible to load 30,000 pounds of linoleum into a single unit of equipment operated by appellants. While some of it can transport 25,000 pounds, "the normal trucking load of linoleum approximates 22,000 pounds." Rejecting appellants' contention based on *Carpets and Carpeting from Official to Southern Territory*, 237 I. C. C. 651, the Division stated:

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents [appellants here] have not presented to us a valid reason *from the point of view of economy in transportation or otherwise*, such as we have found to exist in connection with certain trainload movements,[4] why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. *We adopt as a policy* the condemnation *as unreasonable* of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. [Italics supplied.]

The Division then found that, on the record, a reasonable truckload minimum on linoleum is 20,000 pounds and there was no showing of operating economies which would result if the pro-

[3] Two proceedings, Investigation & Suspension Docket No. M-1216 and No. M-1445, were heard separately, but consolidated before the Division.

[4] E. g., Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I. C. C. 485.

posed rates were restricted to apply only when 30,000 pounds are tendered. It concluded that the proposed schedules "are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable." The proposed schedules therefore, to the extent found not just and reasonable, were ordered cancelled "without prejudice to the establishment . . . of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 per cent of the corresponding first-class rates." 31 M. C. C. 193.

Thereafter oral argument was had before the full Commission. At this stage the National Industrial Traffic League intervened and supported the Division's position.[5] The Commission affirmed the Division's findings "that the proposed rates 45 and 47.5 per cent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 per cent of first class, are subject to a minimum of 30,000 pounds." Both rates, it said, "are within the zone of reasonableness." But "the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000 pound lots and be unjustly discriminatory to shippers of 20,000-pound lots." Since at that time the tariffs disclosed appellants' rates were either 45 or 47.5 per cent of first class, minimum 20,000 pounds, no order for the future was made. The Commission, in concluding its discussion, said:

> We are mindful of the fact that we approved certain [motor carrier] rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra.* However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, *but that for the future we shall follow the policy announced in the prior report herein* with respect to minimum weight in excess of the loading capacity of the equipment customarily used by the motor carriers. [Italics supplied.]

[5] This intervenor did not appear in the District Court, not having notice of the proceedings there until after the argument there. The appearance here is by virtue of an order granting a motion to intervene.

The District Court, sustaining the Commission's findings and decision,[6] held that the extent to which competition should be recognized in arriving at just rates is a matter, within reasonable limits, for the expert judgment of the Commission and that, in exercising its discretion, that body had met the requirements of Section 216(i) of the Motor Carrier Act.[7] 49 U. S. C. § 316(i).

I.

Notwithstanding the apparent difference between the Division and the full Commission, in the former's view that the proposed rate minimum 30,000 pounds is unreasonable and the latter's that it is both unreasonable and unduly discriminatory, the net effect is that the rate is unlawful, as a matter of policy which condemns all volume minimum rates unless it is clearly shown they will operate at costs per 100 pounds less than the costs incurred at reasonable loading capacity rates.

Whether this policy is now intended to apply to all forms of transportation, rail, motor and water, without regard to competitive conditions affecting two or more of them, is not clear from the abbreviated reports made in this case. But their casting of the matter in terms of unqualified policy, dependent only upon proof of the required reduction in operating costs, gives both

[6] The decree dismissed appellants' bill to set aside and enjoin enforcement of the Commission's order of suspension. The court agreed that the proposed rate of 45 per cent, minimum 30,000 pounds, is "a mere adoption on a volume basis of rates for railroad carload lots," having "no relation to the business of the motor carriers," both because there was no showing of any saving in operating costs when carrying more than 20,000 pounds and because there was none that a 45 to 47.5 rate, for anything beyond 20,000 pounds "would not enable them to maintain reasonable competition with the railroads." As to the finding that rates of either 45 or 47.5 per cent, minimum 20,000 pounds, would not in themselves be unreasonable, the court said this "does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment."

[7] The court found that the Commission had met the section's requirements "in that it has given 'due consideration . . . to the inherent advantages of transportation by such carriers, [and] . . . to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service. . . .'" No specific reference was made, however, to the over-all national transportation policy, or its requirements particularly in relation to the Commission's duty "to . . . foster sound economic conditions . . . among the several carriers; to encourage the establishment and maintenance of reasonable charges, . . . without . . . unfair or destructive competitive practices; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail. . . ." Cf. note 13 *infra* and text.

appearance and substance to the view this may be true, if not with respect to all carriers, then certainly with reference to motor carriers. If so the effect will be, as appellants urge, not to make reduction in costs merely one factor, nor indeed even the most important factor, in determining the reasonableness and discriminatory or contrary character of rates. It will be rather to make reduction in costs the exclusive criterion, eliminating all other considerations, including competitive conditions amounting to necessity. That is true, notwithstanding the Commission's report, immediately prior to stating its adoption of the policy announced by the Division, gave expression in an abstract way to a directly contrary principle, namely, "the extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case."[8] The latter statement, taken literally, squarely contradicts the policy unless indeed the statement was intended to qualify it in situations not indicated or contained an implicit limitation from context that the only "facts in each case" which would be material are those which would prove a reduction in costs.

That the purpose was not to qualify the policy seems apparent, not only from the latter's unqualified formulation and adoption and from the failure to intimate in what types of situation the qualification might operate, but also from two other considerations. One is that the statement was followed immediately by the broad

[8] The Commission long has recognized that "reference to and . . . consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time" are necessary. 20 I. C. C. 43. Included as pertinent have been such "facts, circumstances, and conditions" as the expense attributable to the character of the commodity, e. g., whether it is subject to special risks or requires special services, cf. Interstate Commerce Commission *v.* Chicago, G. W. Ry., 209 U. S. 108; 113 I. C. C. 389; 87 I. C. C. 711, or its transportation character is affected by the manner of packing, 98 I. C. C. 166; the value of the service rendered and of the commodity, e. g., 83 I. C. C. 334; 100 I. C. C. 471; 102 I. C. C. 325; cf. Interstate Commerce Commission *v.* Delaware L. & W. R. R., 64 Fed. 723 (C. C. N. D. N. Y.); the possibility of securing continuous business or additional tonnage, Interstate Commerce Commission *v.* Baltimore & Ohio R. R., 145 U. S. 263; peculiar needs or conditions affecting specific areas, 9 I. C. C. 318; 113 I. C. C. 389; 146 I. C. C. 419; cf. Texas & Pac. Ry. *v.* Interstate Commerce Commission, 162 U. S. 197; rates on the same or similar commodities elsewhere, 113 I. C. C. 389; 122 I. C. C. 235; and the need to meet competition, either by the same or other type of carrier, Interstate Commerce Commission *v.* Texas & Pac. Ry., 162 U. S. 197; Interstate Commerce Commission *v.* Alabama Midland Ry., 168 U. S. 144; Texas & Pac. Ry. *v.* United States, 289 U. S. 627; Interstate Commerce Commission *v.* Illinois Central R. R., 263 U. S. 515; Mississippi Valley Barge Line Co. *v.* United States, 292 U. S. 282; Barringer *v.* United States, 319 U. S. 1. See also 142 I. C. C. 121; 235 I. C. C. 485; 235 I. C. C. 723; 237 I. C. C. 651.

and conclusive declaration, in general terms, without supporting data or reasons, except as supplied by the policy itself, that "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination." The statement was not limited to the particular competitive situation. In terms it applied to all between rail carriers and motor carriers. In short, the policy, and therefore the single factor that there was no evidence to show reduction in cost, was the sole criterion of decision. Other facts, including competitive disadvantage, became irrelevant. And the significance of the policy's application becomes more manifest by virtue of the fact that the case, though presented and decided on its own record, was regarded and determined as a test case.[9] Finally, the Commission's review of its previous decisions, upon which appellants relied, shows, we think, that its purpose, in the case of motor carriers at any rate, is to adhere strictly to the policy and, in the manner made, may be taken to indicate that it contemplates no departure whatever. If so, the effect of the decision is not merely to adopt "a policy of administration," as the Commission and the intervenors before it assert; but is rather to adopt, as a rule of law, the principle that only upon a showing of reduction in operating costs may a volume minimum rate be found reasonable and not unduly discriminatory.

II.

The Commission considered chiefly previous decisions in *Carpets and Carpeting from Official to Southern Territory, supra*; *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485; and *Petroleum Rail Shippers' Ass'n* v. *Alton and S. R. R.*, 243 I. C. C. 589. In the *Molasses* case, notwithstanding the Commission's previous refusal to authorize rail volume rates for more than carload lots at less than carload rates, it approved a multiple car rate, minimum 1,800 tons, on molasses which was lower than the carload rate. The effect was to authorize a lower rate to a number of carloads tendered as a single shipment. The

[9] The brief of the National Industrial Traffic League, intervenor, points out that appellants and other carrier associations joined in a petition to the Commission for reargument and reconsideration of eleven cases previously decided by Divisions 2 and 3, including the one presently involved, I. and S. No. M-1216. The petition was rejected, since the petitioners were not parties of record to all the proceedings. But coincidentally the Commission reopened I. and S. No. M-1216, for oral argument.

departure was made to enable the rail carriers to meet water competition. However, there was a showing that in the circumstances a material saving in costs per 100 pounds would be made in transporting such multiple-car shipments. In the *Petroleum Shippers* case the Commission considered authorizing multiple-car rates on petroleum, but declined to do so upon finding that the record did not establish existence of a substantial cost saving in such shipments.

In the *Carpets and Carpeting* case the Commission approved certain rates subject to a minimum weight of 30,000 pounds on linoleum. In doing so, it said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading. 237 I. C. C. 651, 657-658.

And in *Peanut Butter from Montgomery, Ala., to Georgia*, 22 M. C. C. 375, Division 2, although declaring in one breath that motor carriers should not maintain volume rates subject to minimum weights greater than equipment generally available can transport, in the next noted that the national motor-freight classification is replete with such ratings, refused to condemn them and said that if they were restricted to apply only when tendered by one shipper, in one day and on one bill of lading, they would be "in consonance with *Carpets and Carpeting from Official to Southern Territory, supra.*"

III.

These cases disclose departures, though tentatively made, from the Commission's long-standing[10] policy in the same respect, adopted when its powers extended only to rail carriers. Influ-

[10] E. g., Paine Bros. & Co. *v.* Lehigh Valley R. R., 7 I. C. C. 218; Anaconda Copper Mining Co. *v.* Chicago & E. R. R., 19 I. C. C. 592, 596; Richards *v.* Atlantic Coastline, 23 I. C. C. 239, 240; Woodward Bennett Co. *v.* St. Paul, L. A. & St. L. R. R., 29 I. C. C. 664, 665; J. W. Dells Lumber Co. *v.* Chicago, M. & St. P. Ry., 38 I. C. C. 464, 465; and compare Seofield *v.* Lake Shore & Michigan So. Ry., 2 I. C. C. 90.

enced primarily by the desire to secure shipping advantages for the small shipper equal to those given the large one and thus to enforce the policy of the interstate commerce legislation against undue discrimination, the Commission at first declined to adopt wholesale rates.[11] The major departure was in allowing lower rates for carload lots than for less-than-carload shipments. This was justified by the difference in costs. Accordingly, the structure became fixed with this as the major and for long the only differential; and with it the principle that such a saving in operations alone justifies a differential. That policy received judicial approval[12] and remained controlling so long as the Commission had authority only over railroads.

But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation.[13] This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the

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[11] See note 10 *supra*.

[12] Compare Interstate Commerce Commission *v.* Delaware, L. & W. R. R., 220 U. S. 235, 240-241.

[13] Motor Carrier Act of 1935, 49 Stat. 543; Transportation Act of 1940, 54 Stat. 899.

That policy demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as, in the statute's language, to "recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and *foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, *without* unjust discriminations, undue preferences or advantages, or unfair or *destructive competitive practices;* . . . all to the end of *developing, coordinating, and preserving a national transportation system by water, highway, and rail,* as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899. [Italics added.] Cf. McLean Trucking Co. *v.* United States, No. 31, decided January 17, 1944.

inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage.

Necessarily the impact of these changes brought problems the Commission previously had not faced. Necessarily too the Commission in facing them, including those of adjustment among the various forms of transportation, called upon its previous experience in the railroad field for guidance to its judgment. But that experience could not apply fully to the other and different forms of carriage. Nor could it do so always when the interests of two or more were found in conflict. Each form of transportation presents, by reason of its peculiar operating conditions, its own problems for the function of rate making. And each, by virtue of competition with others, presents additional complications arising from the varied circumstances of their operation. Hence, in such situations, principles previously established for application within a single form of transportation cannot always be transplanted to control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest.

Thus, in the problem presented by this case, application of the principle that volume minimum rates will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation, may be made within either the railroad area or the motor area without substantial disturbance or difficulty. Each has its unit of carriage or loading and that unit has a substantial relation to costs; hence, upon the long-established railroad principle, to reasonableness and the discriminatory or nondiscriminatory character of rates. But, as between rails and motors, the two units are different. And the two forms of carriage compete, unless the lower rates geared to the respective units are of a character that each forces the other form of carriage from the field. The junction of difference in available units, with rates geared to them, and the fact of competition or competitive possibility produces or may produce consequences neither the character of the unit nor the fact of competition, nor both together, could create in either form of service taken alone. In short, the very fact a rail carload is 30,000 pounds and a truckload 20,000, with rates respectively tied to these weights, may make a life-or-death difference in the competitive struggle, with consequences

affecting not only the carriers but the public interest as well. And appellants' argument that a 30,000-pound minimum is necessary to meet rail competition is at least consonant with the frequent recognition, both by the Commission and by this Court, that there are occasions when it is appropriate for the former to consider a carriers' need to meet other carriers' competition as a factor justifying what otherwise would be an unreasonable or an unduly discriminatory rate.[14]

But whether and to what extent competition may have destructive effect, or other consequences hurtful to the public interest, in a particular situation may depend not merely on the difference in sizes of units, but on other factors. Each form of carriage has some inherent advantages over the others, such as mobility, speed, normal volume capacity, etc. Purely legal restrictions, such as limitations upon tonnage placed on trucks by state laws, create like or contrary effects. Whether, in a particular situation, the mere difference in loading capacity or some other or others of the many important factors affecting competitive position will be controlling depends upon the character of, and the factors involved in, that situation. And this is as true of one form of transportation as of another when, but for rate structures geared solely to costs of operation, it comes within a competitive tangent.

IV.

In such a situation, therefore, to tie rate differentials exclusively to minimum weights based on available unit size conceivably might allocate all shipments of that size to the form of transportation to which it appertains. Or, if the effect were less extensive, still it might impose conditions upon the competition unduly burdensome or not required by the competitive situation and the applicable statutory policies. Thus, appellants say the Commission's ruling has such consequences in this case, namely, to force them to make the 45 per cent rate available on shipments between 20,000 and 30,000 pounds, thus placing the railroads at a disadvantage on such tonnages and compelling the motor carriers to reduce their rates on them below what the competition requires; or to compel them to forego an equality of rate with the railroads on shipments of 30,000 pounds and more by charging only the

[14] Cf. note 8 *supra*.

one rate of 47.5 per cent on all shipments of 20,000 pounds and more. From these alternatives it is charged the consequence is to force the truckers "out of that very large field of traffic" and allocate it to the railroads. Whether this is the effect or not, we have no means of knowing on this record. Nor can we tell, other than by sheer acceptance of the Commission's conclusion, in the form of its statement of the result and cryptic formulation of the policy on which it is rested, whether the proposed rates will give the motor carriers an undue competitive advantage as to shipments of 20,000 to 30,000 pounds, whether there will be discrimination in fact between classes of shippers, or whether though these things may result in the particular situation they will do so only by virtue of its peculiar features or by virtue of its conformity to conditions generally prevailing in regions competitive as between rail and motor carriers.

These, and other questions of like import, remain unanswered upon the record. The problem is novel. It is not free from complexity, as appears from the Commission's hesitant departures from, then its return to, the long-established railroad rule, in inter-carrier situations. Further, the matter is one of general importance. It affects not only shipments of linoleum, and motor carriers, but many kinds of shipment and all kinds of carriers within the Commission's jurisdiction. It may touch vitally the public interest. It involves, to some extent, the important task of reconciling previously established railroad policies with, or adapting them to, the requirements of the presently effective National Transportation Policy and its application to a coordinated transportation system. Upon a matter of such consequence and complexity, our function in review cannot be performed without further foundation than has been made.

We do not mean by this to imply that the result the Commission has reached would not be sustained if a sufficient basis were supplied in the record. We do not undertake to determine what result the Commission should reach. But we cannot say the one at which it has arrived has the sanction of law without further basis than we now have. This in itself requires reversal. Consequently we need not speak concerning appellants' other contentions, except insofar as the pertinence of some of them to the necessary further proceedings requires.

V.

Appellants' broadest contention must be rejected at this stage. It is, in effect, that as a matter of law, in the particular circumstances competitive necessity becomes the controlling consideration, and costs of operation, that is the requirement that minimum volume rates be geared to loading capacity, become immaterial. That view must be rejected for the same reason as requires rejection, on this record and until further buttressed, of the Commission's converse view that costs exclusively control and competition becomes immaterial. Conceivably particular circumstances might make one or the other factor predominant and, in such a situation, the choice would be for the Commission to make, upon a proper weighing of the facts and opposing policies possibly applicable. Whether in any case this contention of appellant could be accepted may be doubtful. Certainly it should not be in advance of further action by the Commission and then only in circumstances which would justify it as being in the public interest so clearly that no other view would be tenable.

Appellants also say that as a matter of law there could be no unjust discrimination in the present circumstances, since they insist there is no showing, upon the facts, that different classes of shippers would be affected. On the contrary they assert that all shippers actually are in the same class and all are free to avail themselves of the alternative rates above 20,000 and 30,000 pounds, 47.5 per cent and 45 per cent, respectively, as they please. But the only bases for this assertion are, first, the absence of any finding that the availability of the 45 per cent rate, minimum 30,000 pounds, "would in practical effect be confined to only a few or a particular class of shippers" and the further assertion that no such finding could be made, since 30,000-pound shipments of linoleum "are the normal units of quantity purchase and sale as revealed by the railroad carload rates which apply between the same localities only on shipments of 30,000 pounds." Obviously, as the Commission noted, the mere existence of these rates in the tariffs hardly could be taken to prove the conclusion appellants sought to draw from that fact. Certainly it could not be taken as conclusive evidence. Whether or not, however, the proposed rates in fact would operate to create an undue discrimination between shippers, or classes of them, is a

matter upon which the record factually throws no light. It is therefore one for further examination by the Commission.

In returning the case we emphasize that we do not question the Commission's authority to adopt and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does. Cf. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, 489. Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Comission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours.

The judgment is

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 105.—October Term, 1943.

Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., and Central States Motor Freight Bureau, Inc., Appellants,
vs.
The United States of America and Interstate Commerce Commission.

Appeal from the District Court of the United States for the Southern District of New York.

[February 7, 1944.]

Mr. Justice Frankfurter, with whom the Chief Justice and Mr. Justice Reed concur, dissenting.

This case in its essentials can be reduced to simple terms; in effect, the question is whether the Interstate Commerce Commission acted unlawfully in holding unreasonable and discriminatory a proposed schedule of rates for the shipment of linoleum in trucks operated by members of appellants, associations of motor carriers. The facts are these. On linoleum shipments between points in New England, New Jersey, Delaware, Pennsylvania, and New York, and destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, the members of the Eastern Central Motor Carriers Association charged 50% of first-class rates, minimum 20,000 pounds.[1] This minimum is approximately the weight which conventionally is a truck-load. Railroad rates on linoleum at this time were 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for those weighing at least 30,000 pounds—a conventional railroad carload.

By schedules filed to become effective August 24th, 1940, Eastern proposed rates of 47.5% of first-class, minimum 20,000 pounds, and 45% of first-class, minimum 30,000 pounds. The practical

[1] "First-class" is used to designate the rates applied to a class of commodities. Percentages of a class rate are used as rates for designated commodities.

effect of this change would be to require a shipper who could send only 20,000 pounds of linoleum to pay a higher rate than one who could ship a consignment of 20,000 and 10,000 pounds. And two shippers, one with 10,000 pounds and the other with 20,000 pounds could combine their shipments at the lower rate, while a shipper of 10,000 pounds who could not conveniently join with others would have to pay the higher rate. These are the changes here in controversy. Upon the protest of the western trunk line rail carriers, later withdrawn when the appellants agreed that their 30,000 pound minimum rate would apply only on shipments "received at and transported from the point of origin, from one shipper in one day and on one bill of lading", operation of the proposed schedules was suspended and Division 3 of the Commission held hearings to determine their validity. Upon their conclusion, Division 3 found that the proposed rates were reasonably compensatory, but that it was physically impossible to load 30,000 pounds of linoleum into a single unit of equipment, and that there was no showing that operating economies result when a 30,000 pound minimum shipment involving a truckload and fraction of another truckload is tendered. The Division thereupon concluded that a minimum weight greater than a truckload is unreasonable unless such a rate is justified by savings in cost, and ordered the proposed schedules cancelled to the extent found unjust and unreasonable. 31 M. C. C. 193.

This decision was fully reviewed by the entire Commission upon oral and printed arguments by the motor carriers, the linoleum shippers, and the National Industrial Traffic League, a group organized to promote the free interchange of commerce. The shippers and the Traffic League urged the Commission to leave the order of Division 3 undisturbed, while the motor carriers sought to justify the rates as legitimate means of meeting rail competition. The Commission agreed with Division 3 that the rates were unreasonable and held that the 30,000 pound minimum, based on no difference in transportation cost, would be discriminatory. 34 M. C. C. 641.

If the sole issue were whether there would be discrimination in favor of the 30,000 pound lot shipper as against the 20,000 pound lot shipper, clearly the Commission could find as it did, and the court below properly did not undo what the Commission did. 48 F. Supp. 432. Is there in fact more? The appellants contend

that rail competition excuses and legalizes the discrimination beyond the Commission's power to condemn. This Court does not yield to this claim, but it does hold that either the Commission must state with particularity why the evidence of competitive conditions in this record is so vague and inadequate as to afford no justification for discrimination, or, in effect, requires the Commission to proceed with a full-dress investigation of the entire competitive relations between motor and rail carriers.

The Commission, on the basis of the evidence before it, concluded that "The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination". Prior decisions of this Court surely do not require greater explication of the reasons on which the Commission's conclusions are based. See *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86-87; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464-465. The Commission did not adopt an inflexible "principle that volume minimum rates will be allowed only when geared to a capacity loading which makes possible a real saving in costs of operation", if its statement that "The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case" is to be accepted. Burke has said somewhere that he could not imagine English law without the law reports. Substantially the same considerations that call for giving reasons in rendering judicial decisions apply to the determinations of such agencies as the Interstate Commerce Commission. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 511. But we should not be more exacting of reports of the Interstate Commerce Commission explaining its orders than we are of the opinions of lower courts whose judgments come before us for review.

Nothing in this record calls for more explicitness than is ordinarily demanded. For nothing in the record requires the Commission to discuss the conceivable validity of proposed schedules which, aside from competitive conditions, are manifestly discriminatory. Such discriminatory rates were supported by a bare recital that railroad rates were nominally lower than motor carrier

rates and that the business of one motor carrier had decreased. At the hearing before the Division, a representative of one motor carrier stated that the proposed rates were more than adequate to cover costs, that they did not vary substantially from rates imposed on the shipment of other comparable commodities, and that railroad competition had caused his company's linoleum business to decline. He also testified that his firm competed for linoleum shipments with other motor-carriers. This is the proposed justification for a rate differential concededly based on no difference in transportation cost or in service rendered and which therefore discriminates between those who ship 30,000 pound lots and those who ship 20,000 pound lots. And the record becomes even more barren when it is noted that the competitive conditions said to require adoption of the proposed discriminatory tariffs were not such as to prevent the rail carriers' acquiescence in the adoption of the new schedule when, on appellants' theory, the rail carriers had advantages intended to be mitigated by the new rates. The Commission found that either 47.5% or 45% was an allowable rate for either a 30,000 or 20,000 pound shipment—either rate "was within the zone of reasonableness". It thereby permitted the motor carriers to compete on an entire equality with the rail carriers. But it forbade discrimination as between linoleum shippers equally placed. What the appellants really complain of is not that they cannot meet the railroad competition at the 45% rate on 30,000 pound lots, but that they cannot do so and yet collect 47.5% on lots of 20,000 pounds which are outside rail competition. Be that as it may, a mere arithmetic difference between railroad rates and motor carrier rates is quite blind. The rates themselves may not be at all revealing on competitive conditions; they may not tell what a shipper gets for his money and what he [redacted] for. That is, the quality of the service, the advantages of one type of service over the other, the availability of equipment, safety, labor cost, and many other factors may all give significance to the figures that figures themselves do not give.

The present ruling apparently imposes upon the Commission the duty of pursuing such complicated and far-reaching investigations every time a motor carrier rate that may have a relation to a railroad rate is found to be discriminatory in relation to another motor carrier rate affecting the same commodity. Such an investigation is an undertaking of vast scope involving con-

sideration of factors which it would require an expert merely to catalogue. The different characteristics of rail and motor carrier services, the economic wisdom of excluding motor carriers from large-bulk linoleum trade or limiting their participation in such trade, the availability of other commodity shipments to replace linoleum trade diverted to rail carriers, the availability of and cost of transporting commodities which might be used to fill the truck only partially loaded with linoleum—these are only a few of the factors which may become relevant. Compare III-B Sharfman, *The Interstate Commerce Commission*, pp. 572 *et seq.* The appellants introduced no evidence on the basis of which the Commission could intelligently weigh these considerations. To hold that the Commission must on its own initiative embark on such an investigation in a proceeding of this nature is to impose what may well be a crippling burden.

To speak more particularly of the task which the Commission now faces, it should be noted that Eastern files tariffs with the Commission for about 650 carrier members. A typical commodities clause from the carriers' certificates of public convenience and necessity provides for the shipment of "*General commodities*, except those of unusual value, and except dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, commodities in bulk, commodities requiring special equipment, and those injurious or contaminating to other lading, over regular routes . . . ." Thus it appears that the exceptions are few and the allowable shipments many. An investigation of the scope apparently required by the Court would entail a detailed study of the relations of the rate structures in a case merely involving the rates on specific commodities one to the other. If rail competition turns out to be actually detrimental to the successful operation of appellants' linoleum business, the war-time load on the railroads might become relevant, and the Commission might have to decide whether the atypical circumstances at this time justify competitive discriminatory rates which might otherwise be unreasonable.

That the Commission is an expert body to which Congress has seen fit to commit the regulation of the intricate relationships between the various means of national transportation is a well-worn phrase which ought not to lose its significance in practice when the actions of the Commission come here for review. We should be very reluctant to define for the Commission the occasions which

appropriately demand investigations of general transportation problems, and more particularly when a contest over the rate on a particular commodity included in a network of tariffs calls for such a general investigation. Surely it is within the special competence of the Commission to put on a discriminating carrier the duty of justifying by proof his plain discrimination as to a particular rate and not permit him to compel the Commission by a mere assertion to embark upon a far-flung inquiry. There are undoubtedly occasions when the Interstate Commerce Commission will undertake such an investigation in the public interest. But it ought not to be compelled to do so upon the occurrence, from an administrative point of view, of a more or less accidental filing of a tariff revision. When the carrier seeks to supplant a lawful rate, as is the case here, the burden is on it to supply all the essential information to justify the proposed new rate. § 216(g), Part II of the Interstate Commerce Act, 49 U. S. C. § 316(g). If it does not do so, it has failed to sustain the duty cast upon it by law, and the Commission in so finding has duly exercised its authority. The Commission's disposition of *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 985 and *Petroleum Shippers' Ass'n* v. *Alton S. R. R.*, 243 I. C. C. 589, are entirely consistent, so far as that is relevant, with its order in this case.